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SUPREME COURT OF THE UNITED STATES.

No. 376.

EX PARTE: IN THE MATTER OF STEPHEN HORSEY, PETITIONER.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

GOVERNMENT PRINTING OFFICE.

1 Pleas of the circuit court of the United States for the district of Indiana, begun and held in the court-house at Indianapolis, on the 1st Tuesday in May, in the year one thousand eight hundred and sixty-five, before the honorable David Davis, one of the associate justices of the Supreme Court of the United States, and the honorable David McDonald, district judge of the United States for the district of Indiana.

Ex parte Stephen Horsey, on petition for a writ of habeas corpus:

Be it remembered that, on the 10th day of May, A. D. 1865, in the court aforesaid, before the judges aforesaid, come Messrs. McDonald and Roche, of counsel for said Horsey, and file here in open court the petition of said Horsey to be discharged from a certain alleged unlawful imprisonment, with three exhibits accom-
2 panying the same, marked, respectively, A, B, and C.

At the same time comes also John Hanna, esq., the attorney prosecuting the pleas of the United States in this behalf, and thereupon, by agreement, this application is submitted to the court, and day is given.

And the said petition follows, in these words and figures, to wit:

3 In the circuit court of the United States in and for the eighth circuit and the district of Indiana, term of , in year of .

Ex parte Stephen Horsey.—Application to be discharged from imprisonment.

THE UNITED STATES OF AMERICA, *District of Indiana, ss:*

Stephen Horsey would respectfully represent unto the honorable the judge of the circuit court of the United States, within and for the district of Indiana, that he is a natural born citizen of the United States, and is now, and has been for more than twenty years last past, a citizen of the said district and State of Indiana, and is entitled to all and singular, the rights, privileges, and immunities of citizens of the United States, and of the State of Indiana; he further says that he has not been in the military service of the United States at any time, and is not now, and never was in the naval service of the United States at any time during his whole life, and is not
4 now; and he expressly says, that at the time of the commencement of the grievances hereinafter set forth, he was not in the military or naval service of the United States, and has not been therein at any time since.

He further says, that on the 14th day of October, in the year 1864, at and in the district of Indiana aforesaid, and at his own house in Martin county, in said Indiana, he was forcibly seized and arrested by the military power of the United States, and under the authority of the President thereof, in pursuance of the order and command of Brevet Major General Alvin P. Hovey, of the United States volunteers, who was at that time in command of the military district of Indiana, and was immediately after his said arrest conveyed from his home in said Martin county, in said district, to the city of Indian-

apolis therein, and was placed in prison and under military guard, and held as a military prisoner under the orders and authority of the President aforesaid and said General Hovey; and has thenceforward until the present time, remained in close confinement as such
5 prisoner, and still remains so, at the military prison near the Soldiers' Home, in said city of Indianapolis; and further, that within the last few days his imprisonment has been rendered more close and severe than before by the fastening of a heavy iron ball and chain to one of his legs, by means of an iron clasp or fetter about his ankle.

He further says that the aforesaid Brevet Major General Alvin P. Hovey, military commander of the district of Indiana, holds him in said military prison in confinement, under the immediate command and control of Colonel A. J. Warner, of the 17th regiment of the Veteran Reserve corps, now in military service of the United States, and inferior officers and soldiers under the command of the said Colonel Warner.

He further says that after his arrest, transportation to, and imprisonment at and in military prison near said Soldiers' Home, in said city of Indianapolis, and district of Indiana, to wit, on the 21st day of October, in the year 1864, one "Major Henry L. Burnett, judge advocate, department of the Ohio and northern department," preferred five several charges and sixteen several specifications
6 thereunder against him, the said Stephen Horsey, and four other persons, to wit, William A. Bowles, Andrew Humphreys, Horace Heffren, and Lambdin P. Milligan, which said charges and specifications are made part of this petition, and a printed copy thereof herewith filed, and for greater certainty of reference marked Exhibit A; and he says that said Brevet Major General Alvin P. Hovey, military commander of said district of Indiana as oforesaid, afterwards, to wit, on the day of October, in the year 1864, approved said charges, and directed the said Stephen Horsey and others against whom said charges were preferred by the said judge advocate to be arraigned and tried thereon by a certain military commission, which the said Brevet Major General Alvin P. Hovey, commander, &c., as aforesaid, had previously ordained and convened at said Indianapolis for the trial of such offenders as might be from time to time sent before it for trial; and he hereby makes the order of said Brevet Major General Alvin P. Hovey, commander, &c., as aforesaid, ordaining, appointing, and convening said military commission a part of this his petition, and files a copy thereof herewith, which he makes
7 Exhibit B for greater certainty of reference.

He further says that afterwards, to wit, on the 21st day of October, in the year 1864, in pursuance of, and obedience to, the order of said Brevet Major General Alvin P. Hovey, military commander as aforesaid, he, and the other persons charged with him in said several charges and specifications, were brought before said military commission, and were then and there arraigned upon said several charges and specifications before said commission, by the said

Henry L. Burnett, judge advocate as aforesaid, and severally pleaded thereto "not guilty" of said charges and specifications.

But he further says that, prior to his pleading to said several charges and specifications as aforesaid, it was expressly understood and agreed between the said judge advocate and himself and his attorneys that his said plea should not in anywise impair his right to object to the jurisdiction of said military commission to try him upon said charges and specifications, or any of them, upon final argument; and that his objection, when so made, should have the same force and effect to which it would have been entitled, if made prior to putting in said plea.

8 He further says that after his arraignment and pleading to said charges and specifications as aforesaid, he and others charged with him were put upon trial before and by said military commission, and were all tried by said commission except the said Horace Heffren, who was released from said charges and specifications by the said judge advocate, in order that he might become a witness on behalf of the government, as it was then said; and he further says that said trial was fully ended and concluded as early as the 1st day of January, in the year 1865.

And he further says that the said military commission found him guilty, and sentenced him to be hung, as will more fully and at large appear, reference being had to General Court Martial Orders No. 214 of the War Department of the government of the United States for 1865, which is made part hereof, and a copy thereof herewith filed, marked Exhibit C; and he further says that said sentence is ordered by the military commander of the district of Indiana aforesaid to be executed upon him on Friday, the 19th day of May,

9 in the year 1865, at a place near Camp Morton, in the county of Marion, and in the district aforesaid.

He further says that, after the proceedings of said military commission were closed and at an end, and more than twenty days after the commencement of his imprisonment aforesaid, to wit, on the 2d day of January, in the year 1865, the honorable circuit court of the United States for the circuit and district of Indiana convened in the United States court-room in the city of Indianapolis in said district, and a legal and proper grand jury of the United States were then and there in said court duly impannelled, sworn, and charged to inquire within and for the district of Indiana aforesaid, and due presentment make, of all crimes and misdemeanors therein committed against the laws of the United States, and the peace and dignity of the same.

He further says that the said term of the said circuit court afterwards, to wit, on the 27th day of January, in the year 1865, came to an end, and the said court then and there adjourned until the 1st Tuesday in May, 1865, having prior the adjournment there-

10 of, to wit, on the 27th day of January, in the year 1865, discharged the said grand jury from further service at said term of said court.

And he expressly says that said grand jury, at said term of said

court, adjourned and was discharged by said court without having found any bill of indictment or made any presentment whatever against him for any offence whatever against any law of the United States or otherwise; and that no bill of indictment or presentment has ever been found or made against him by any grand jury of the United States since his imprisonment, for any offence whatever, although said grand jury met, inquired, and adjourned as aforesaid, at the said term of said circuit court.

He further says that said military commission had no jurisdiction whatever, under the laws and Constitution of the United States, to try him upon said charge, or upon any charges whatever, he being a citizen of the United States and of the State of Indiana, and never having been, at any time since the commencement of the present rebellion in the United States, a resident of any one of the States whose citizens were arrayed against the government of the United States.

11 He further says that owing to the fact that he has, all the time from commencement of said rebellion until his arrest, imprisonment, and trial by said military commission, been an inhabitant, resident, and citizen of Indiana, whose government and people have upheld and supported the government of the United States in its conflict with rebels in arms against it, it was, has been, and still is wholly out of his power to have acquired belligerent rights and placed himself in such relation to government as to have enabled him to violate the laws of war; nor can he ascertain how it is possible for him to have forfeited the rights guaranteed by the Constitution to every citizen, of a trial within the State and district in which his alleged offences are charged to have been committed, upon an indictment by a grand jury of such district, duly impannelled and sworn, and by an impartial jury of such district, impannelled, tried, and sworn according to law.

In order, therefore, that he may have his legal and constitutional rights, he prefers this his humble petition to the honorable circuit court of the United States for the district of Indiana; and prays that under the act of Congress approved March 3d, 1863, entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before this court by the writ

12 of habeas corpus, or such other process as the court may award for that purpose, together with the cause of his caption and detention, to do and receive whatsoever the court may, upon full and final hearing, order and adjudge in relation thereto; and that at all events he may be delivered from said military custody and imprisonment, and if found probably guilty of any improper conduct or offence against the United States of America, turned over to the proper civil tribunal for inquiry and punishment, according to law, or for discharge from custody altogether.

He further prays that said writ may be directed to the said Alvin P. Hovey, brevet major general, commanding, &c., as aforesaid, the said A. J. Warner, colonel, &c., as aforesaid, and to all other persons under them, and that they, each and all, be required to produce in

court the body of him, the said Stephen Horsey, together with the cause of his caption and detention.

And, as in duty bound, he will ever pray, &c., &c.

STEPHEN HORSEY.

13 Subscribed and sworn to before me, the undersigned, a notary public in and for Marion county, in the State of Indiana, this 10th day of May, 1865.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at Indianapolis, in said county and State.

[SEAL.] MILTON BELL, *Notary Public.*

[5 cent stamp.]

(Here follows Exhibits A, B, and C, same as in cases of Milligan and Bowles.)

14 And afterwards, to wit, at the court aforesaid and before the judges aforesaid, such proceedings were had in the cause above entitled that on the 11th day of May, in the year 1865, comes the said Stephen Horsey, by Messrs. McDonald and Roach, his attorneys, and moves the court that a writ of habeas corpus do issue according to the prayer of said petition. And said Horsey, by his attorneys aforesaid, also prays that he be ordered to be discharged according to the prayer of the petition aforesaid.

And these motions coming on to be argued at this term, it occurred as a question whether upon the facts set forth in said petition and exhibits, a writ of habeas corpus ought to be issued as prayed in said petition; and also whether, upon the facts stated in said petition and exhibits, the said Horsey ought to be discharged as in said petition prayed; and also whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein, had any jurisdiction to try and sentence said Horsey, in manner and form as

15 in said petition and exhibits stated.

On which questions the opinions of the judges were opposed:

Whereupon, on motion of the said Horsey, by his counsel aforesaid, it is ordered that the said petition and exhibits, together with the following questions, be certified to the Supreme Court of the United States for their decisions, according to the act of Congress in such case made and provided; which questions are these:

1. On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued according to the prayer of said petition?

2. On the facts stated in said petition and exhibits, ought the said Stephen Horsey to be discharged from custody, as in said petition prayed?

3. Whether upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?

16 IN THE EIGHTH JUDICIAL CIRCUIT, *District of Indiana, ss:*

I, John D Howland, clerk of the circuit court of the United States in the circuit and district aforesaid. do hereby certify that the above and foregoing is a full, true, and complete transcript of the record of the case above entitled, and of all entries and papers therein, as fully as the same remain of record and on file in my office.

In testimony whereof, I do hereunto set my hand and affix the seal of said court, at Indianapolis, this 13th day of May, A. D. 1865.

[SEAL.] J. D. HOWLAND, *Clerk C. C.*

[5-cent stamp.]

17 I, D. W. Middleton, clerk of the Supreme Court U. S., do hereby certify that the exhibits A, B, and C, omitted in this printed record and contained in the original manuscript, are precisely similar with the exhibits as printed in the cases of Milligan and Bowles.

In testimony whereof, I hereunto subscribe my name this second day of March, A. D. 1866.

D. W. MIDDLETON, *Clerk S. C. U. S.*

Filed: March 1, 1866.

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Mr Justice Miller

SUPREME COURT OF THE U. S.

EX PARTE, LAMBDIN P. MILLIGAN.

SUPREME COURT OF THE U. S.

EX PARTE, LAMBDIN P. MILLIGAN.

STATEMENT OF FACTS.

Lambdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in Huntington County in said State, by the order of Brevet Maj. Gen. Alvin P. Hovey, Military Commandant of the District of Indiana, and by the same authority confined in a Military prison, at or near Indianapolis, the capital of said State. On the 21st day of the same month, he was placed on trial before a "Military Commission," convened at Indianapolis, by order of Maj. Gen. Hovey, on the following charges; prefered by Maj. Henry S. Burnett, Judge Advocate of the North-Western Military Department, namely:

First. "Conspiracy against the government of the United States."

Second. "Affording aid and confort to rebels against the authority of the United States."

Third. "Inciting insurrection."

Fourth. "Disloyal practices."

Fifth. "Violation of the laws of war."

Over his objection to the authority of the Commission to try him, he was found guilty on all of the charges, and sentenced to suffer death by hanging. This sentence was approved May 1865.

On the 10th day of May, 1865, Milligan filed his petition in the Circuit Court of the United States, for the District of Indiana, by which the above facts appeared; and also, the additional facts, namely: that while the petitioner was so held and detained in Military custody (and more than twenty days after his arrest),

a Grand Jury of the Circuit Court of the United States, for the District of Indiana, was convened at Indianapolis, his said place of confinement, and duly empanneled, charged and sworn for said district, held its sittings, and finally adjourned, without having found any bill of Indictment, or made any Presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service. Nor had he been within the limits of any State whose citizens were engaged in rebelion against the United States, at any time during the war, but during all the time aforesaid, and for twenty years last passed he had been an inhabitant resident, and citizen of Indiana. The petitioner's claim to be discharged from the military custody in which he is held, is founded upon the provisions of an act of Congress of March 3d, 1863, entitled "An Act relative to *Habeas Corpus*, and regulating judicial proceedings in certain cases."

At the hearing of the petition in the Circuit Court the opinions of the Judges were opposed upon the following questions:

First. "On the facts stated in said petition and exhibits, ought a writ of *Habeas Corpus* to be issued according to the prayer of said petitioner.

Second. "On the facts stated in said petition and exhibits, ought Lambdin P. Milligan to be discharged from custody as in said petition prayed.

Third. "Whether, upon the facts stated in said petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated."

These questions, on motion were certified up for the opinion of this Court.

The main question arises upon the third point stated, namely: whether upon the facts stated the "Millitary Commission" had jurisdiction, legally to try and sentence said Milligan in manner and form as in said petition stated.

POINTS MADE BY THE PETITIONER.

I.

The personal rights of the citizen are secured by the follow-

ing provisions of the Federal Constitution:

Art. 3d, sec. 2, clause 3d; also arts. 4th, 5th, 6th, 7th and 8th of Amendments.

The chief of these rights are:

First. The right to be secure in person and effects against unreasonable search and seizure.

Second. Not to be subject to trial for any capital or other infamous crime, unless upon presentment or indictment of a Grand Jury, (except in cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger), nor to be deprived of life, liberty or property without due process of law.

Third. In all criminal prosecutions the right to a speedy and public trial before an impartial jury of the State or District wherein the crime shall have been committed, which District shall have been previously ascertained by law.

II.

The suspension of "the privilege of the writ of *Habeas Corpus*, can effect none of these rights, except the right of a speedy trial. Art. 1st, sec. 9th, H. L. Scott, Military Dictionary, p. 382, (1st Blk. Com. 136), stat. 57, Geo. III, ch. 3.

III.

The Constitution vests in Congress all legislative power granted by it to the Federal Government. Art. 1st, sec. 1st.

IV.

This power extends only to the passage of such laws as shall be necessary to carry into execution the specific powers granted to Congress, and such others as are vested by the Constitution in the Government of the United States, or in any Department, or Officer thereof. Art. 1st, sec. 8th, clause 18th.

V.

The United States have no unwritten Criminal Code to which resort can be had as source of jurisdiction. Conklings Treatise 3d, ed. p. 168; ex parte Bollman et al. 4th, Cranch 32; United States vs. Hennson et al. 7th Cranch 31; United States vs. Coolridge, 1st Wheat 415; United States vs. Bevans, 3d Wheat 336; United States vs. Wiltberger, 5th Wheat 76.

VI.

The Federal Government possesses no power to define and punish crimes generally, but only such as result from the

violation of some law enacted by Congress, and authorized by the Constitution, or such as arise within the exclusive jurisdiction of the United States, or without the jurisdiction of any State.

VII.

In the exercise of these powers, Congress has defined and provided for the punishment of offenses which may be committed by the citizen against the lawful authority of the Federal Government. All trials for any such crimes or offenses, must be in accordance with the provisions of the Constitution, above cited, relating to the rights and privileges of the citizen.

VIII.

Under the power "to make rules for the government and regulation of the land and naval forces, and for governing such part of the militia as may be employed in the service of the United States," Congress has defined and provided for the punishment of such offenses as are purely military in their character, or committed by persons subject to military jurisdiction.

IX.

In the exercise of the power "to constitute tribunals

inferior to the Supreme Court, Congress has ordained two classes of Courts,—1st. Civil Courts, or ordinary Courts of Justice, in which, under the Constitution, the laws in general of the Federal Government are administered "according to the the course of the common law." 2d. Military Courts, or "Courts Martial," in which military law (not martial) is administered according to the rule of that law.

X.

No person can be *legally* tried for any offense against the laws of the United States, unless he is tried in one or the other of these Courts; nor can he be *legally* put upon trial unless he is charged in the manner provided in the Constitution and laws, for some offense or crime, defined by Congress under authority of the Constitution.

XI.

The record in this case shows that the petitioner was not tried before either of the tribunals authorized by the Constitution and ordained by Congress, nor was he charged in the manner provided by the Constitution; and, therefore, the pretended finding and sentence of the Military Commission is void.

XII.

A "Military Commission" is no Court "ordained or established by Congress." It is a mere council of war, convened to advise the commanding officer in what cases it might be proper to execute martial law, or the law of force, and can only act in cases where he might execute martial law without its aid or advice.

XIII.

If it be claimed that the President's proclamation of September 4th, 1862, conferred jurisdiction upon the Military Commission, to try the petitioner,—

THE PETITIONER OBJECTS.

First. The proclamation was unauthorized by any act of Congress, and was, therefore, void. Art. 1st, sec. 9, clause 2d, Constitution.

Story on the Constitution, vol. 2d, § 1342; exparte Bolman, 4th Cranch, p. 95; exparte Maryman, opinion of Chief Justice Taney. English precedents—Habeas Corpus act, 31st, Charles 2d, Bill of Rights, 1686.

Second. If not void, it could effect no purpose except to suspend the right to bail or trial. As President, it was his duty "to take care that the laws be faithfully executed." (Art. 2d, sec. 3d.) As commander in chief of the army and navy of the United States, he was bound to govern them in accordance with such rules as Congress should provide for their "government and regulation;" and in neither capacity could he enact laws, or establish rules, or ordain Courts.

Third. The declaration of martial law contained in the proclamation, if authorized, could only operate in those places where military force, as a fact, had suspended the civil functions of the Government, and could only for the time suspend, not abrogate, the rights of the citizen. Luther *vs.* Borden, 7th How. 34, opinion of Woodbury, same case, p. 49, (H. L. Scott's Military Dic., p. 382.)

Fourth. Martial law, as anciently defined, can have no existence in this country. (Blk. Com. book 1st, p. 413.) And other text writers, defining the same.

Fifth. That the proclamation in question has been wholly superceded by the act of Congress of March 3d, 1863, relating to *habeas corpus* (12 Stat. at Large, 775), under the provisions of which the petitioner claims his discharge; and the President's proclamation, based thereon, of September, 15th, 1863.

Seventh. The act of Congress of March 3d, 1863, is the only law of the land relating to this case and under its provisions, the petitioner must be discharged. It sanctions military arrests, but it in effect, inhibits the military trial of citizens, and restores to them the right of the writ of *Habeas Corpus* unless indicted by the proper Grand Jury, within the time specified. And while it protects the citizens against long continued arbitrary confinement, it particularly guards the public safety by suitable provisions to be enforced by the Court.

Geo. R. Coffroth

J. E. McDONALD,
A. L. ROACHE,
For Petitioner.

1865

SUPREME COURT

Of the United States.

IN THE MATTER OF

WILLIAM A. BOWLES,

Petitioner.

ARGUMENT OF MR. DAVID DUDLEY FIELD,

FOR THE PETITIONER.

NEW YORK:
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No. 45 Fulton Street (near Pearl).

1866.

Supreme Court

OF THE UNITED STATES.

IN THE MATTER OF WILLIAM A. BOWLES, *Petitioner.*	Mr. FIELD'S ARGUMENT FOR THE PETITIONER.

The petitioner is a native of the United States, and has been for more than twenty years a citizen of Indiana (fol. 3). Though not "in the land or naval forces of the United States," or connected in any way with the public service (fol. 3), he was arrested on the 18th of September, 1864, at his home in Indiana, by order of General Hovey, commanding the military district of Indiana (fol. 3), taken to Indianapolis, and there, in October following (fol. 4), tried by a military commission (fols. 7, 8), and sentenced to be hung (fols. 8, 53). The sentence was commuted to imprisonment for life, and he is now in the penitentiary undergoing this imprisonment (fol. 4). The charges upon which he was tried were five, viz:

1. "Conspiracy against the Government of the United States" (fol. 14);

2. "Affording aid and comfort to rebels against the authority of the United States" (fol. 19);

3. "Inciting insurrection" (fol. 22);

4. "Disloyal practices" (fol. 24); and

5. "Violation of the laws of war" (fol. 29).

Under the first charge there were four specifications; under the second, three; under the third, two; under the fourth, five; and under the fifth, two. The substance of these various specifications, was joining and aiding at different times between October, 1863, and August, 1864, a secret society known as the order of American Knights or Sons of Liberty, "for the purpose of overthrowing the government and duly constituted authorities of the United States" (fol. 14), * * * "at a period of war and armed rebellion against the authority of the United States, at or near the City of Indianapolis, Indiana, a State within the military lines of the army of the United States, and the theatre of military operations and which had been and was threatened to be invaded by the enemy" (fols. 14, 15). This was amplified and stated with various circumstances, thus:

In the SECOND SPECIFICATION OF THE FIRST CHARGE: Combination with certain persons to "adopt and impart to others the ritual of the society;" "denying the authority of the United States to coerce to submission certain rebellious citizens of the United States" (fol. 15).

THIRD SPECIFICATION OF THE FIRST CHARGE: The society's intent and purpose "to cripple and render powerless the efforts of the Government of the United States in suppressing a then existing formidable rebellion against the said government" (fol. 17); and in the

FOURTH SPECIFICATION OF THE FIRST CHARGE: Conspiracy "to seize by force the United States and State Arsenals at Indianapolis, Indiana; Columbus, Ohio; and Springfield, Illinois; to release by force the rebel prisoners held by authority of the United States," * * * * "arm those prisoners with the arms thus seized, and that

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these said conspirators with all the forces they were able to raise in the secret order above named, and were in conjunction with the rebel prisoners thus released and armed to march into Kentucky and Missouri, and co-operate with the rebel forces to be sent to those States by the rebel authorities, against the government and authorities of the United States" (fol. 18).

In the FIRST SPECIFICATION OF THE SECOND CHARGE, "communicating with the enemies of the United States, with intent that they should * * invade the States of Kentucky, Indiana and Illinois, with the further intent, that the order aforesaid should * * co-operate with the said armed forces of the rebellion * * and communicating" to them that intent (fols. 19, 20).

SECOND SPECIFCATION OF THE SECOND CHARGE: Sending a member of the said order "with instructions for * * * other members * * to select good couriers or runners * * * for the purpose of assisting those in rebellion against the United States, to call to arms the members of the order and other sympathizers with the existing rebellion, whenever a signal should be given by the order" (fol. 21).

THIRD SPECIFICATION OF THE SECOND CHARGE: "Joining themselves in an unlawful secret society, * * * designed for the overthrow of the Government of the United States, and to compel terms with the * * * Confederate States * * * and communicating the designs of that society to those in rebellion" (fol. 22).

In the FIRST SPECIFICATION OF THE THIRD CHARGE: "Organizing, and attempting to arm, and arming a portion tion of the citizens of the United States, through an unlawful secret society, known as the Order of American Knights * * with intent to induce them, with themselves, to throw off the authority of the United States, and to co-operate with their armed enemies" (fol. 23).

In the SECOND SPECIFICATION OF THE THIRD CHARGE: "By public addresses, &c., arousing sentiments of hostility to the government of the United States, and attempting to induce the people to revolt * * and secretly arm and organize themselves to resist the laws of the United States" (fol. 24).

In the FIRST, SECOND, THIRD AND FOURTH SPECIFICATIONS OF THE FOURTH CHARGE: "Advising citizens to resist a draft * * and arming citizens of the United States belonging to the Order of American Knights, for the purpose of resisting the draft" * * * * * (fol. 25,) at four different places named (fols. 25 to 29).

In the FIFTH SPECIFICATION OF THE FOURTH CHARGE: "Accepting and holding offices in the military forces for the State of Indiana, in an unlawful society, known as the Order of American Knights, * * being offices and forces unknown to the Constitution and laws of the United States, and of Indiana * * and in opposition to the legally constituted authorities thereof" (fol. 28).

In the FIRST SPECIFICATION OF THE FIFTH CHARGE: "Violating their allegiance * and attempting to introduce enemies of the United States into the loyal States, thereby to overthrow and destroy the authority of the United States" (fol. 29).

SECOND SPECIFICATION OF THE FIFTH CHARGE: "Organizing and extending an unlawful secret society * * having for its purpose the same general object and design as the enemies of the United States, and with the intent to aid and insure the success of said enemies, in their resistance to the authorities of the United States" (fol. 30).

I will not here stop to call attention to the great misapplication of language in connecting the last charge with the two specifications under it. It is called a "violation of the laws of war," for a citizen to violate his

allegiance, and to attempt the introduction into the country of its enemies. It is also called a "violation of the laws of war" for a citizen to organize a secret society, "having for its purpose the same general object and design as the said enemies of the United States, and with the intent to aid and insure the success of the said enemies in their resistance."

While the petitioner was in prison, and nine days before the time appointed for his execution, he presented a petition to the Circuit Court of the United States for the District of Indiana, setting forth the foregoing facts with a copy of the charges, specifications, finding, and sentence, and praying, that under the "Act of Congress, approved March 3d, 1863," entitled "An Act relating to Habeas Corpus and regulating judicial proceedings in certain cases," he may [might] be brought before this court, by writ of Habeas Corpus, or such other writ or order as the court [might] award for that purpose, together with the cause of his caption, and detention, to do and receive whatever the court [might] upon full and final hearing, order and adjudge in relation thereto, in pursuance of the Act of Congress aforesaid, and that at all events he [might] be delivered from said military custody and imprisonment, and if found probably guilty of any improper conduct or offence, against the United States of America, turned over to the proper civil tribunals for inquiry and punishment according to law, or for discharge from custody altogether."

Upon this petition the judges were divided in opinion, and they sent to this court, a certificate of their division, upon the following three questions:

1. "On the facts stated in said petition and exhibits, ought a writ of Habeas Corpus to be issued, according to the prayer of said petition?"

2. "On the facts stated in said petition and exhibits, ought the said William A. Bowles to be discharged from custody, as in said petition prayed?"

3. "Whether upon the facts stated in said petition

and exhibits, the military commission mentioned therein, had jurisdiction to try and sentence said Bowles, in manner and form as in said petition and exhibits is stated?"

The argument upon these questions naturally divides itself into two parts:

First.—Was the military commission a competent tribunal for the trial of the petitioner, upon the charges upon which he was convicted and sentenced?

Second.—If it was not a competent tribunal, can the petitioner be released by the Circuit Court of the United States for the District of Indiana, upon writ of Habeas Corpus or otherwise?

The discussion of the competency of the Military Commission, is first in order, because, if the petitioner was lawfully tried and convicted, it is useless to enquire how he could be released from an unlawful imprisonment.

If on the other hand the tribunal was incompetent, and the conviction and sentence nullities, then the means of relief become subjects of enquiry and involve the following considerations:

[1.] Does the power of suspending the privilege of the writ of Habeas Corpus appertain to all the great departments of government concurrently, or to some only, and which of them?

[2.] If the power is concurrent, can its exercise by the executive or judicial department be restrained or regulated by Act of Congress?

[3.] If the power appertains to Congress alone, or if Congress may control its exercise by the other departments, has that body so exercised its functions as to leave to the petitioner the privilege of the writ, or to entitle him to his discharge?

In considering the first question, that of the competency of the military tribunal for the trial of the peti-

tioner upon these charges, let it be observed at the beginning, that for the same alleged offenses, the petitioner could have been tried and punished by the ordinary civil tribunals. For "conspiring against the government of the United States;" for "affording aid and comfort to rebels against the authority of the United States;" for "inciting insurrection;" for the "disloyal practices" set forth in the five specifications under that charge, and for the "violation of the laws of war," set forth in the two specifications under the fifth charge, penalties considered sufficient by the law-making power had been already declared and ample provision made for indictment and trial in the ordinary courts. Thus, by the act of July 31, 1861 (12 *U. S. Stat.*, 284),

§ 1: "If two or more persons within any State or Territory of the United States shall conspire together, to overthrow or to put down, or to destroy by force, the Government of the United States; or to levy war against the United States; or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder or delay the execution of any law of the United States; or by force, to sieze, take or possess any property of the United States, against the will, or contrary to the authority of the United States; or by force, intimidation, or threat, to prevent any person from holding any office, or trust, or place of confidence under the United States; each, and every person so offending, shall be guilty of a high crime, and upon conviction thereof, in any district or circuit court of the United States, having jurisdiction thereof, or district or supreme court of of any Territory of the United States, having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars, and not more than five thousand dollars; or by imprisonment, with or without hard labor, as the court shall determine, for a period not less than six months, nor greater than six years, or by both, such fine and imprisonment."

By the Act of August 6, 1861 (12 *U. S. Stat.*, 317),

§ 1: "If any person shall be guilty of the act of recruiting soldiers or sailors in any State or Territory of the United States to engage in armed hostility against the United States, or who shall open a recruiting station for the enlistment of such persons, either as regulars or volunteers, to serve as aforesaid, shall be guilty of a high misdemeanor, and upon conviction in any court of record

having jurisdiction of the offence, shall be fined a sum not less than two hundred dollars, nor more than one thousand dollars, and confined and imprisoned for a period not less than one year, nor more than five years.

§ 2. "The person so enlisted, or engaged as a regular or volunteer, shall be fined in a like manner a sum of one hundred dollars, and imprisoned not less than one nor more than three years."

By the Act of Feb. 25, 1863 (12 *U. S. Stat.*, 696),

§ 1: "If any person being a resident of the United States, or being a citizen thereof and residing in any foreign country, shall, without the permission or authority of the Government of the United States, and with the intent to defeat the measures of the said government, or to weaken in any way their efficacy, hold or commence, directly or indirectly, any correspondence or intercourse, written or verbal, with the present pretended rebel government, or with any officer or agent thereof, or with any other individual acting or sympathizing therewith; or if any such person above mentioned, not duly authorized, shall counsel or assist in any such correspondence or intercourse, with intent as aforesaid, he shall be deemed guilty of a high misdemeanor, and, on conviction before any court of United States having jurisdiction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not less than six months nor exceeding five years."

And by the Act of July 19, 1862 (12 *U. S. Stat.*, 590),

§ 2: "If any person shall incite or set on foot, assist or engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding $10,000, and by the liberation of all his slaves, if any he have; or by both of said punishments at the discretion of the court."

Let it also be observed, that the civil tribunals, state and federal, usually sitting in the State of Indiana, have been always open; that their regular proceedings have not been interrupted; and that their processes have been regularly executed. These are facts of public notoriety, and a part of the history of the country, of which the Courts will take judicial notice. (13 *Peters*,

590; 2 *Robinson, La.*, 469; 3 *Martin, La.*, 546.) And above all, the judges of the Circuit and District Courts of the United States in the District of Indiana had judicial knowledge of it, for their sittings were and have ever been uninterrupted. The charges and specifications do not even suggest that the regular course of justice has been even once impeded. All that they pretend is, that the acts were done "at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, Indiana, *a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded* by the enemy." It is not material to remark that this suggestion is a gross perversion of the facts. To be within military lines is to be within the lines of sentinels which mark the boundary of military occupation, and within which the discipline of the camp, under the control of the Provost Marshal, alone prevails. The judges to whom this petition was addressed, know that this was not true then, and had never been true of the State of Indiana. They also know in what sense it could be truly said, that Indiana was the theatre of military operations, or invaded or in danger of invasion. Certainly it was never so much as Pennsylvania, not so much even as Ohio or Illinois.

Then let it be remembered, that the petitioner was a simple citizen, not belonging to the army or navy; not in any official position; not connected in any manner with the public service. He was in the condition of any other citizen who might fall under suspicion—any judge, lawyer, physician, or clergyman of the State of Indiana. The assumption of the right to try him upon these charges, is the assumption of the right to try any other citizen of Indiana, whoever he might be, upon the same charges. The evidence against the petitioner is not to be found in this record, and it is immaterial. His guilt or his innocence do not affect the question of the competency of the tribunal, by which he was judged. What he disputes, and what I dispute, is the jurisdiction of the military commission to decide the issue of guilt or inno-

cence. He may, for aught I know, have been as guilty as a fiend, or as pure as an angel. If he was in heart disloyal to his country, I abhor and despise him; if he has been guilty of any act of treason, let him be tried for it before the judges of the land; if he has conspired against the safety or the honor of the nation, there is the Act of Congress for his punishment; and if by reason of any defect in the law of evidence, or of juries, he might escape conviction before the civil tribunals, here are the two Houses of Congress sitting in the wings of this Capitol, who can amend the laws. I am not seeking to screen the guilty, but I contend for the right of every man to be judged according to the laws, for thereby only can it be certainly known, who is guilty or who is innocent. I am struggling, not for the escape of guilt, but for the safeguard of innocence.

Bearing in mind, therefore, the nature of the charges, and that they amounted either to treason or conspiracy; bearing in mind also the presence and undisputed authority of the civil tribunals and the civil condition of the petitioner, let us see by what authority, another kind of tribunal was constituted for his trial, upon these charges. By what authority does it purport on the face of the proceedings to have been constituted? It was established by special order of General Hovey, of the United States Volunteers, who was at that time in command of the military district of Indiana (fols. 4 and 32), which order names one brigadier general and six colonels to hold a military commission at Indianapolis. The commission was subsequently enlarged by the addition of four colonels and one lieutenant colonel. What was the general jurisdiction of this commission; whom it was to try, and for what offences, does not appear further than that it was to try "Harrison H. Dodd, and such other prisoners as might be brought before it." The only special direction was, this—"the commission will sit without regard to hours."

It was called a military commission. What is a military commission? Is it a body known to the laws? Is it a court martial under another name, or what is the difference between them?

Whether a court martial or something else, it was a board of military officers, convened by a military commander, under color of his military authority.

Had this board any sanction from act of Congress? None is pretended, unless it is inferred from the act of March 3d, 1863. This act, it has been sometimes said, though not now much insisted on, gives the sanction of Congress to the President's Proclamation of Sept. 24th, 1862. That proclamation ordered that "during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, *their aiders and abettors*, within the United States, and *all persons discouraging* volunteer *enlistments, resisting militia drafts*, or *guilty of any disloyal practice, affording aid and comfort to rebels*, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial, or military commission." The 4th Section of the act of Congress, declared, "that any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest or imprisonment, made, done or committed, or acts omitted to be done, under, and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue."

Assuming this section to be constitutional and valid, it goes only the length of making the President's order a *defence* to an action or prosecution, civil or criminal, for a *search, seizure, arrest or imprisonment*. It gives no other validity or vitality to any Presidential order. Suppose, for example, General Hovey had executed the plaintiff, and been therefor indicted for murder, under the laws of Indiana, the President's order and this act of Congress would not have sufficed for his defence. Or suppose there had been a writ of prohibition sued out from the Supreme Court of Indiana to restrain the military commission from acting, the President's order and the act of Congress would not have been of themselves a sufficient answer to the writ.

There being, then, no act of Congress for the establishment of the commission, it depended entirely upon the executive will, for its creation and support. This brings up the true question now before the Court. Has the President, in time of war, by his own mere will and judgment of the exigency, the power to bring before his military officers, any man or woman in the land, to be there subject to trial and punishment, even to death? The proposition is stated in this form, because it really amounts to this; for even though these military officers were infallible, and would never misjudge or mistake the innocent for the guilty, yet their power to try, is their power to judge all; which means that all, without distinction, may, upon charge of *disloyal practices,* be brought before them, for trial and sentence.

If the President has this awful power, whence does he derive it? From the Constitution? He can exercise no authority whatever, but that which the Constitution of the country gives him. Beyond it, he has no more power than any other citizen. Our system knows no authority beyond or above the law. We may, therefore, once for all, dismiss from our minds, every thought of the President's having any prerogative, as representative of the people, or as interpreter of the popular will. He is elected by the people to perform those functions, and those only, which the Constitution of his country, and the laws made pursuant to that Constitution, confer.

My argument therefore, upon the first head, will be confined to the true interpretation of that instrument or charter; and if I pause at any time to consider any related topics, it will be only to illustrate and confirm the interpretation which I would enforce.

What then are the powers and attributes of the presidential office? They are written in the second article of the Constitution, and so far as they relate to the present question they are these. He is vested with the "executive power;" he is "commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States;" he is to "take care that

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the laws be faithfully executed;" and he takes this oath: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States." Here are all the words from which the power to try civilians before military commissions can be derived, if it exist at all. Is it possible to derive it from any of them? The "executive power" mentioned in the Constitution, is the executive power of the United States. The President is not clothed with the executive power of the States. He is not clothed with any executive power, except as he is specifically directed by some other part of the Constitution, or by an Act of Congress; in other words, the expression, "executive power," standing by itself, and without a specification of what he is to execute, would not enable him to execute at all. The same expression is used in the State Constitutions, and with the same result. For example, the Constitution of New York declares that "the executive power shall be vested in a Governor," and that he "shall take care that the laws are faithfully executed," while, in truth, he executes very little. The State officers, as they are called, corresponding with those which make the Cabinet of the President, are chosen by the people, and are quite independent of the Governor. There is no portion of the Constitution of the United States which prescribes what the President shall do, in the exercise of his "executive power," and which affects the present question, except those which I have quoted.

We must recur, then, to the other parts of the Constitution which have been quoted. The President is to "take care that the laws be faithfully executed." He is to execute the laws, by the means, and in the manner, which the laws prescribe. For example, an Act of Congress authorizing him, by the machinery of custom-houses, to collect the revenues, would not empower him to stop ships at sea, and there exact the customs. An Act of Congress authorizing him to get up a navy, by building ships and enlisting seamen, would not authorize

the impressment of seamen. The laws provide not only what is to be done, but the manner of doing it; and all these the President is to execute.

The oath of office cannot be considered as a grant of power. Its effect is merely to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience against any attempt to usurp power or overthrow the Constitution.

Federalist No. 69
Brown vs U.S.
8. Cranch 126. 127. 129. 145
Dynes vs Hoover
20 How: 81. 83
Wilson vs Mackenzie
7. Hill 97

There remains, then, but a single clause to discuss, and that is the one which makes him the commander in chief of the army and navy of the United States, and the militia of the States, when called into the federal service. The question, therefore, is narrowed down to this: Does the authority to command an army carry with it authority to arrest and try by Court Martial civilians, by which I mean persons not in the martial forces, not impressed by law with a martial character? The question is easily answered. To command an army, whether in camp, or on the march, or in battle, requires the control of no other persons than the officers, soldiers and camp followers. It can hardly be contended that, if Congress neglects to find subsistence, the commander in chief may lawfully take it from our own citizens. It cannot be supposed that, if Congress fails to provide the means of recruiting, the commander in chief may lawfully force the citizens into the ranks. What is called the war power of the President, is nothing more than the power of commanding the armies and fleets, which Congress causes to be raised. To command them is to direct their operations.

Much confusion of ideas has been produced by mistaking *executive* power for *kingly* power. Because, in monarchical countries, the kingly office includes the executive, it seeme to have been sometimes inferred, that, conversely, the executive carries with it the kingly prerogative. Our executive is in no sense a king, not even for four years. The difference between his office and that of the most constitutional king on earth, does not consist in the one being hereditary and the other elective, or in one being responsible and the other irresponsible, or in one being for life and the other for four years, but in the essential attributes of the two offices.

Thus far I have reasoned upon that article of the Constitution, the second, which creates and regulates the executive power. If we turn to the other portions of the original instrument (I do not now speak of the amendments) the conclusion already drawn from the 2d article, will be confirmed, if there be room for confirmation. Thus, in the first article, Congress is authorzed "to declare war, and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of the land and naval forces;" "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" "to provide for organizing, arming, and disciplining the militia and governing such part of them as may be in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;" "to exercise exclusive legislation in all cases whatsoever over * * * all places purchased * * * for the erection of forts, magazines, arsenals, dockyards;" "to make all laws which shall be necessary and proper for carrying into execution the * * * powers vested by this Constitution in the government of the United States, or in any department or office thereof."

These various provisions of the first article would show, if there were any doubt upon the construction of the second, that the powers of the President do not include the power to *raise* or *support* an army; or to *provide* or *maintain* a navy; or to *call forth the militia*, to repel an invasion, or to suppress an insurrection, or *to execute the laws;* or even to *govern* such portions of the militia as are called into the service of the United States; or to make law for any of the forts, magazines, arsenals or dockyards. If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of Indiana to repel an invasion of that State, or when called, govern them, it is absurd to say, that he could nevertheless, under the same circumstances, govern the whole State and every person in it by martial rule.

The jealousy of the executive power prevailed with our forefathers. They carried it so far, that, in providing for the protection of a State against domestic violence, they required, as a condition, that the *legislature* of the State should ask for it, if it could be convened. *Const., Art.* 4, *Sect.* 4.

I submit therefore, that upon the text of the original Constitution, as it stood when it was ratified, there is no color for the assumption, that the President by his mere will, without act of Congress, could create military commissions for the trial of persons not military for any cause or under any circumstances whatever. But as we well know, the Constitution in the process of ratificatian had to undergo the severest ordeal, which any instrument ever yet underwent, from discussion and criticism alone, before actual experiment. Objections were started by jealousy and by fear; dangers were supposed; evil consequences predicted, and great apprehension and alarm created. To quiet these apprehensions, as well as to guard against any possible dangers, ten amendments were proposed by the first Congress sitting at New York, in 1789, and were duly ratified by the States. The third and fifth of these amendments are as follows:

"ART. III.—*No soldier shall* in time of peace, *be quar-*
"*tered in any house*, without the consent of the owner,
"nor *in time of war, but in a manner to be prescribed by*
"*law.*"

"ART. V.—*No person shall be held to answer for a*
"*capital or otherwise infamous crime, unless on a present-*
"*ment, or indictment of a grand jury, except in cases arising*
"*in the land or naval forces, or in the militia when in actual*
"*service, in time of war or public danger;* nor shall any
"person be subject for the same offence to be twice put
"in jeopardy of life or limb, nor shall be compelled in
"any criminal case to be a witness against himself, nor
"be deprived of life, liberty, or property, without due
"process of law, nor shall private property be taken for
"public use without just compensation."

If there could have been any doubt whatever, whether military commissions for the trial of persons not "in the

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land or naval forces, or the militia" in actual service, could ever be established by the President, these amendments would have removed the doubt. They were passed for a state of war as well as a state of peace; they were aimed at the military authority, as well as the civil, and they were as explicit as our mother tongue, the noble language of freemen, could make them. "No soldier shall * * * be quartered in any house * * * *in time of war* but in a manner to be prescribed by law." "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger.*" The phrase "in time of war or public danger," qualifies the member of the sentence relating to the militia; as otherwise, there could be no court martial in the army or navy during peace. Here is a clear, unequivocal command of all the people, in contemplation of a state of war, no less than a state of peace, and stamped, as with types of iron, into their organic law, that at no time shall any person whatever be subject to military trial, *except in these specified cases.*

These amendments were proposed, as I have already stated, in the first Congress held under the Constitution; they were brought in by Mr. Madison, and their history, the form in which they were introduced, and the changes which they underwent are most instructive. His proposition in this respect was in the following words:

"The trial of all crimes (except in cases of impeachment and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites; and [in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an indispensable preliminary; provided, that in cases of crimes committed within any county which may be in] possession of the enemy or in which a general insurrection may prevail the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.

"In cases of crimes not committed within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolable."

This was referred to a committee of eleven, which struck out the part in brackets and substituted therefor the following:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the."

The whole proviso was struck out in the Committee of the Whole, and finally the proposition was reduced between the two houses to the form in which it now stands.

This completes my argument upon the text of the Constitution. The language of that instrument should set the matter at rest forever. There is no room left for interpretation. The words are direct and plain. It would be difficult to make them plainer or more direct. If one should set himself to the task of expressing most clearly the intention to limit and restrain military jurisdiction, he would find it hard to choose a better form of words. If he were to exclude military commissions by name, that would perhaps leave the door open to the same thing in another form. The language used here is general and comprehensive. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." This solemn declaration of the whole people, set in their great organic charter, ought forever to command obedience and preclude debate.

But I will proceed further, and show that military tribunals for civilians, or non-military persons, are, whether in war or peace, inconsistent with the liberty of the citizen, and can have no place in constitutional government; that such has been the understanding of statesmen and lawyers, for more than two centuries; and that just in proportion as the government of a country becomes constitutional, in that proportion the possibility of martial rule, except for martial persons, is limited or taken away.

This is a legitimate argument upon a question of interpretation, for if there be, as I think there is not, room left for interpretation of what seem to be the plain provisions of the Constitution, then the principles of liberty, as they were understood by the Fathers of the Republic, the maxims of free government, as they were accepted by the men who framed and those who adopted the Constitution, and those occurrences in the history of older states, which they had profoundly studied, may be called in to show us what they must have meant by the words they used.

In the first place, let us consider for a moment, what would be the condition of the country, if the fundamental law were otherwise, than as I have stated it. The President would become in time of war, foreign or domestic, an actual dictator. He could swallow up every other power in the State. That notion of the war power which would make it competent to bring civilians before military commissions, rests upon the theory, that the commander in chief may do whatsoever is necessary to promote the success of his armies, and that he is the sole judge of the necessity. If any Governor of any State, or any State Legislature, or any of the courts of the States stand in his way, the military tribunal is at hand to try, and the military platoon to arrest and execute. I know not, indeed, why Congress or the Supreme Court are sacred. Certainly the individual members of Congress, and the individual members of this Court, must be answerable to military tribunals, like other civilians. For if the war power may *judge* civilians, it may *judge* all civilians.

If this war power belongs to the commander in chief, as commander of the whole army, it belongs to every other commander in his own sphere; for, if it exists at all, it is an incident of the command of military forces. Acts of Congress do not give it; acts of Congress cannot take it away. It inheres in the military office, and goes with it wherever it goes.

This will not only be true of the national forces, but it will be true of the State forces. The Governor of each State is as much commander in chief of the State forces,

as the President is commander in chief of the national forces. The Constitution of New York, for example, declares that "the Governor shall be commander in chief of the military and naval forces of the State." And again: "When the Governor shall, with the consent of the Legislature, be out of the State in time of war, at the head of a military force thereof, he shall continue commander in chief of all the military force of the State." Any State, it will be remembered, may, according to the Constitution of the United States, "engage in war," at any time, with the consent of Congress; and without it, when "actually invaded, or in such imminent danger as will not admit of delay." Upon the theory of the war power which I am now combatting, the condition of this federal republic of ours would be singularly deplorable and perilous, with our one federal commander in chief, our thirty-six State commanders in chief, and any number of subordinate commanders, all armed with the power to supersede every other tribunal but their own; and their own to constitute, *when* they please, *of whom* they please, and *for whom* they please.

If the power exists independent of Congress, it may be exercised in any form which the commander may choose; persons may be arrested with or without warrant; they may be imprisoned with or without information of the cause of imprisonment; they may be brought to trial before a board of officers or privates; their judges may be partial or impartial; the evidence may be legal or illegal, or there may be none at all; the sentence may be verbal, and carried into effect without written order of any kind. It is not an answer, to say that this is most unlikely to happen—nay, that it is most improbable. We are not considering probabilities, but possibilities. It *might* happen. The will of the commander in chief, or of his subordinates, could not be controlled by Congress, and *might* be exerted in an irregular and tyrannical manner.

It would not be a legal argument in favor of military commissions for civilians, even if it could be proved that civil tribunals are inadequate to administer that swift

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justice, which the exigencies of war may sometimes demand. That would be an argument for amending the Constitution, not for perverting it. But it has not been proved that the civil tribunals are not sufficient for the trial of civilians. Congress can create as many Courts as it will; can endow them with functions, adequate to any emergency; can make their processes as short and effective as the fiercest lover of quick justice could desire, and can prescribe such qualifications for jurors, whenever juries are necessary, as to insure a decision according to the law and the evidence. Whoever desires more than that, desires not justice, but injustice; not freedom and safety, but tyranny and peril.

If the law were otherwise, if our system of government did really sanction or tolerate such a use or abuse of military power, then I know not how we can condemn either the theory or the practice of the governments of continental Europe, or boast of our superiority in either. Their normal condition it might almost be said, is that of war, foreign or domestic. For the last hundred and sixty-five years, that is, since the beginning of the war of the Spanish Succession, there has not been tranquility throughout that continent for a single decade. France was at war with foreign nations with scarcely an interval down to 1815, and was convulsed by civil wars for many years. Spain, Austria, Prussia, and Russia, had a like experience of foreign war. Armies, on a gigantic footing, have been constantly maintained. From Archangel to Gibraltar, Europe has been a vast camp. If a republican president, because he is commander in chief of the army and navy, can rightfully create military tribunals for the trial of civilians in time of war, much more rightfully could the kings of the elder continent do the same at the head of their great armies, in the plenitude of their kingly offices, and with scarcely a restraint in the shape of constitutions, parliaments, diets, or states general. If the doctrine or the practice is to be enforced among us, let us hear less of the military prisons of Austria and Spain.

The source and origin of the power to establish military commissions, if it exist at all, is in the assumed power to

Wellington's Speeches vol 2. page 733—

declare what is called *martial law*. I say what is called martial law; for strictly, there is no such thing as martial *law;* it is martial *rule;* that is to say, the will of the commanding officer and nothing more, nothing less. Let us see if there be under our system any such power vested in the President, and if there be, whence is it derived, and what are its limits. We must be careful to distinguish between *military* law and *martial* law. The former consists of the rules and articles of war, a well-known and well-defined code, for the government of the army and navy. *Mills v. Martin*, 19 *John.*, 7, 22; *Martin* v. *Mott*, 12 *Wheat.*, 19.

The constitutional history of England, is the history of a struggle on the part of the crown to obtain or to exercise a similar power in the country of our forefathers. The power claimed by the king was moreover rather in virtue of his royal prerogative and of his feudal relations to his people as lord paramount, than of his title as commander of the forces. How that struggle was carried on from the days of Runnymede, down; with what various fortune, what alternations of success and defeat, till its final settlement during our colonial days, it were needless to recount in this presence. Suffice it to say, that if anything was settled in the constitutional law of the mother country, at the period when our own constitution was formed, it was the absolute illegality of military commissions for the trial of civilians, for any offence, at any time, or under any circumstances whatever. Hale, in his history of the common law, says, (page 34,) "Touching the business of martial law these things are to be observed, viz:

First.—That in truth and reality *it is not a law* but something indulged, rather than allowed as a law; *the necessity of government*, order and discipline *in an army* is that only which can give those laws a countenance *quod enim necessitas cogit defendi.*

Secondly.—This indulged law was only to extend to members of the army, or to those of the opposed army, and never was so much indulged as intended to be

executed or exercised upon others, *for others who were not listed under the army had no color or reason to be bound by military constitutions* applicable only to the army, whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject *though it were a time of war.*

Thirdly.—That the exercises of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace."

Blackstone, (*Book*, 1 *pp.*, 413, 414,) says: "For martial law which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline *in an army*, is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas Earl of Lancaster, being condemned at Pontefract, 15 Edw. II., by martial law, his attainder was reversed, 1 Edw. III., because it was done in time of peace. And it is laid down, that if a lieutenant, or other that hath commission of martial authority, doth in time of peace, hang or otherwise execute any man by color of martial law, this is murder, for it is against *Magna Carta*. The petition of right moreover enacts, that no soldier shall be quartered on the subject without his own consent, and that *no commission shall issue to proceed within this land according to martial law.*"

Lord Loughborough delivering the judgment of the King's Bench in Grant *a.* Sir Charles Gould, (2 H. Black., 69, 98,) says:

"*Martial law*, such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, *does not exist in England at all.* Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court martial, but

which bears no affinity to *that which was formerly attempted to be exercised in this kingdom, which was contrary to the Constitution, and which has been for a century totally exploded.*"

"In the reign of King William there was a conspiracy against his person in Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law. And within a very recent period, the incendiaries who attempted to set fire to the docks at Portsmouth, were tried by the common law. In this country, all the delinquencies of soldiers are not triable as in most countries in Europe, by martial law, but where they are ordinary offences against the civil peace, they are tried by the common law courts. *Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain.*"

"The object of the Mutiny Act therefore, is to create a Court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers, and the object of the trial is limited to military duty. Even by the extensive power granted by the Legislature to his Majesty, to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are, though necessary to the regularity and discipline of the army."

It may not be inappropriate to recall some of the incidents of the eventful struggle which ended in the establishment of the constitutional doctrine set forth in the foregoing extracts. More than five hundred years ago, in the reign of Edward the Second, during a violent civil commotion, much more like war than anything that has ever been seen in the State of Indiana, the Earl of Lancaster at the head of a large army, being defeated by the superior forces of the king, was condemned by court martial and beheaded. This proceeding was reversed on petition of error in the first parliament of Edward the Third, and the following declared:

"1. That in time of peace, no man ought to be adjud-

ged to death, for treason or any other offence, without being arraigned and held to answer; 2. *That regularly, when the king's courts are open, it is a time of peace, in judgment of law;* and 3, that no man ought to be sentenced to death, by the record of the king, without his legal trial per pares."

Three hundred years later, Charles the First, in time of war, finding the means wanting for its vigorous prosecution, had resort to forced loans, and by warrant of his privy counsellors, committed Sir Thomas Darnell and three other gentlemen to the Tower for refusing. They brought a Habeas Corpus for their deliverance, but it being argued that the commitment by the king, for reasons of state, was sufficient cause, the petitioners were remanded. The first Parliament, however, that was afterwards summoned, called the judges to account for this judgment, and after a severe struggle between the commons and the crown, which lasted from March to June, 1628, during which Coke and Selden maintained the debate on the part of the subject, it was finally resolved, by the Petition of Right, among other things, that whereas, divers *commissions* have been issued, "by which certain persons have been assigned and appointed commissioners, with power and authority to proceed within the land according to the justice of martial law," "the aforesaid commissions for proceeding by martial law, should be revoked and annulled, and that thereafter no commissions of like nature should issue forth to any person or persons whatsoever." *Sir Thomas Darnell's case*, 7 *Hargrave's State Trials*, 114, *and* 3 *Howell's State Trials*, 1–174, 225, 230, 234.

The champions of the Parliament in the contest over the Petition of Right declared: "Without all question, the very point, scope and drift of Magna Carta was to reduce the regal to a legal power, in matter of imprisonment, or else it had not been worthy so much contending for." 3 *Howell's St. Tr.*, 174; *Sir Benjamin Rudyard's Reply.*

This was the constitutional law of the mother country when our forefathers settled this continent. They brought it with them. They claimed the rights and liberties of

Englishmen, and this exemption from military rule of all but military persons was one of them. Throughout the colonial history we find the colonists clinging with immoveable tenacity, to trial by jury, Magna Carta, and the Petition of Right.

In England, the struggle with the House of Stuart ended forever the claims of the regal power to try Englishmen by any other trial than jury, before the judges of the land.

From the day when the answer of the sovereign was given in assent to this Petition of Right, Courts Martial for the trial of civilians have always been illegal, and always reprobated. During the great rebellion, when the whole land was ravaged by the opposing armies of the Parliament and the King, irregular and illegal trials sometimes occurred, but only to be pointed at and condemned by the historian. Hume observes, upon the history of the commonwealth:

"The Earl of Derby, Sir Timothy Featherstone, Bemboe, being taken prisoners after the battle of Worcester, were put to death by sentence of a Court Martial; a method of proceeding declared illegal by that very petition of right, for which a former parliament had so strenuously contended, and which, after great efforts, they had extorted from the King."

After the restoration of Charles, notwithstanding the severity shown to the adherents of the commonwealth; during the reaction of James the Second, and the introduction of William of Orange; notwithstanding the cruelties arising out of the invasions of the Pretender, and the Irish rebellion, I do not find the case of a single person, not connected with the army, suffering death or other penalty from a Court Martial. And even in respect to the government of troops in England, and the establishment of Courts Martial for military offences by military men, the sovereign has no authority, except as derived from the annual "Mutiny Act."

The preamble to the first Mutiny Act, passed in the time of William and Mary, recorded that: "Whereas no man may be forejudged of life or limb or subjected to any

kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm."

The Acts which have been framed at different periods for the suspension of the privilege of Habeas Corpus, and for indemnity to the ministers against prosecutions for extreme measures, give no sanction, in any shape, to Courts Martial. The suspension extends only to the privilege of relief from temporary imprisonment, and the indemnity is from the consequences of ordering it.

After the accession of William and Mary to the throne of England, whenever extraordinary measures were thought necessary for the public safety, application was made to parliament. Witness the following on the first of March, 1688: "Mr. HAMDEN, one of his majesty's most honorable privy council, acquainted the House that he had a message from his majesty, 'that his majesty had had credible information, that there are several persons in and about this town, that keep private meetings and cabals, to conspire against the government, and for the assistance of the late King James; that his majesty has caused some of those persons to be already apprehended and secured upon suspicion of high treason, and that he thinks he may see cause to do so by others, within a little time; but his majesty is between two great difficulties in this case; for that, if he should set those persons at liberty that are apprehended he would be wanting to his own safety, and the safety of his government and people; on the other hand, if he should detain them, he is unwilling to do anything but what shall be fully warranted by law, which he hath so often declared he will preserve; and that, therefore, if those persons should deliver themselves by the act of Habeas Corpus, there would be another difficulty. That his majesty is likewise unwilling that excessive bail should be taken in this case, his majesty remembering that to be one article of the grievances presented to him; that ordinary bail will not be sufficient for men that carry on such designs, in hopes of succeeding, will not stick at forfeiting a small sum; and that this falling out when the parliament is sitting, his majesty,

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therefore, thought fit to ask the advice of this House therein, and intends to advise with the Lords also.'

"*Resolved, nem, con.*, That the humble thanks of this House be returned to his majesty for his most gracious message in desiring the advice of this House,

"*Resolved*, That a temporary bill be brought in to empower his majesty to apprehend and detain all such persons as he shall have just cause to suspect are conspiring against the government.

"*Ordered*, That Mr. Hamden, Sir Richard Temple, Mr. Pollexfen, Mr. Sacheverell, Sir Thos. Lee, Sir Thos. Clarges, Sir John Holt, Mr. Brewer, do immediately withdraw into the Speaker's Chamber, and prepare the said bill, and bring the same in with all convenient speed."

Of this Act Mr. Macaulay writes: "The malcontents out of doors did not fail to remark, that in the late reign the Habeas Corpus act had not been one day suspended," and in another place, III. Vol., 37, he says: "Even James did not venture to inflict death by a sentence of a court martial."

These principles of the free Constitution of England spread upon the Continent of Europe as the people gained upon their sovereigns. There the legal formula for declaring martial law in any place, is to declare it in a state of siege; as if there were, in the minds of lawyers everywhere, no justification, for such a measure, but the exigencies of impending battle. The charter established for the government of France, on the final expulsion of the first Napoleon, contained these provisions:

ART. 13.—"The king is the supreme chief of the state; he commands the forces by sea and land; declares war; makes treaties of peace, alliance and commerce; appoints to every office and agency of public administration; and makes rules and ordinances necessary for the execution of the laws, without the power ever of suspending them, or dispensing with their execution."

Art. 18.—"The king alone sanctions and promulgates the laws." Art. 53.—"No person can be withdrawn from his natural judges." Art. 54.—"Therefore there cannot be erected commissions or extraordinary tribunals." When Charles the Tenth was driven from the kingdom,

Article 54 was amended by adding the words, 'under what name or denomination soever;' Dupin, giving the reason thus: "In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever,' for specious names have never been wanting for bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Now, it so happened, that two years later the strength of these constitutional provisions was to be tested. A formidable insurrection broke out in France. The king issued an order, dated June 6th, 1832, placing Paris in a state of siege, founded "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th; on attacks upon public and private property; on assasinations of national guards, troops of the line, municipal guards and officers in the public service; and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." On the 18th of June, one Geoffroy, designer, of Paris, was by a decision of the second military commission of Paris declared "guilty of an attack, with intent to subvert the government and to excite civil war," and condemned to death.

He appealed to the Court of Cassation. Odilon Barrot, a leader of the French Bar, undertook his case, and after a discussion memorable forever for the spirit and learning of the advocates, and the dignity and independence of the judges, the court gave judgment, that "Whereas, Geoffroy brought before the 2d military commission of the first military division is neither in the army nor impressed with a military character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction and the provisions of Articles 53 and 54 of the charter and those of the laws above cited: On these grounds the court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom, and es-

pecially the judgment of condemnation of the 18th of June, instant; and in order that further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," &c.

Mark now the change which has taken place in France. When the government of Louis Philippe was replaced by a republic, the power of declaring a state of siege was taken from the executive and given to the legislature. But when Louis Napoleon began his usurpation his first step was to issue this decree of the 2d of December. "The President of the Republic decrees—

1st.—"The National Assembly is dissolved.

2d.—"Universal suffrage is re-established.

3d.—"The French people are convoked in their various districts from the 14th to the 21st of December.

4th.—"The state of siege is declared in the whole extent of the first military division.

5th.—"The Council of State is dissolved."

And when he afterwards came to frame the Constitution of his empire, he inserted this article: "He (the emperor) has the right of declaring a state of seige in one or more departments, provided that he inform the Senate thereof with the least delay."

Let us now return from this rapid survey of the law on this subject, prevalent in free England and in France, while she was free, to our own country, and starting from the adoption of the Constitution, run rapidly along our constitutional history, to observe how this subject of martial rule has been considered and treated. In Stacy's case, which occurred during the last war with Great Britain, a writ of Habeas Corpus was issued to Commodore Chauncey and General Lewis, commanding on the frontiers, to bring up the body of Stacy. General Lewis stated "that he believed the said Stacy had been guilty of treasonable practices, in carrying provisions and giving in-

For the manner in which the subject was treated even during the revolution see Resolution of Congress & acts of Penn. See Fisher's Trial of the Court p. 225.

formation to the enemy, and that he believed a court martial was the proper tribunal to try the said Stacy, though he was a citizen." Observe now, what was the language of the court as delivered by Kent. "This is a case which concerns the personal liberty of the citizen." * * * "The pretended charge of treason, (for upon the facts before us, we must consider it a pretext) without being founded upon oath, and without any specification of the matters of which it might consist, *and without any color of authority in any military tribunal, to try a citizen for that crime*, is only aggravation of the oppression of the imprisonment." * * * "If ever a case called for the most prompt interposition of the court to enforce obedience to its process, this is one. *A military commander is here assuming criminal jurisdiction over a private citizen*, is holding him in the closest confinement and contemning the civil authority of the State."

Smith *agt.* Shaw, also in the Supreme Court of New York (12 *Johns.*, 257), was an action brought against a military officer for confining the plaintiff on charges of "exciting insurrection and mutiny among the good citizens of the United States," "violating his parol as a prisoner of the enemy, and engaging in an illicit trade, to furnish the enemy with necessaries from the United States," and "being an enemy's spy, in time of war, between Great Britain and the United States." It was argued for the defendant that the power to arrest in such a case was "essential to the public safety—'*Salus populi suprema lex.*' This is not a doctrine dangerous to liberty, or to the rights of citizens, qualified as it is with the requisites that there must be a case of necessity, a probable cause for the arrest—*Silent leges leges inter arma.*" For the plaintiff it was replied: "It cannot surely be pretended, that the plaintiff, a naturalized citizen, could be treated as a spy. The plaintiff is entitled to all the benefits of our Constitution and Bill of Rights. It is one of the very grievances enumerated in the Declaration of Independence, that the king had affected to render the military independent of and superior to the civil power. It is matter of astonishment, that in less than forty years,

and in the life of the men who framed that instrument, it should be argued in a court of justice, that this military power can be exercised in this country; in England it would not even be debated." THOMPSON, Chief Justice, delivered the opinion of the Court, and among other things said: "None of the offences charged against Shaw are cognizable by a court-martial except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy." And again: "The conduct of the defendant in this case does not appear to have been harsh and oppressive. But it is the principle involved in it, which renders the question important. If the defendant was justifiable in doing what he did, every citizen of the United States would in time of war be equally exposed to a like exercise of military power and authority."

Lamb's case, 1 *N. C., Law Repository*, related to the extension of the rules and articles of war to the militia during the late war with Great Britain, Judge Bay, giving the opinion of the Court, said: "The constitutionality of martial law has been called in question. If by martial law is to be understood that dreadful system, the law of arms, which in former times was exercised by the King of England and his lieutenants; when his word was the law and his will the power by which it was exercised, I have no hesitation in saying, that such a monster could not exist in the land of liberty and freedom * * * * But if by this military code is meant to be understood the rules and regulations for the government of our men in arms, when marshaled in defence of our country's rights and honor then I am bound to say, there is nothing unconstitutional in such a system."

In Johnson *agt.* Duncan, 3 *Martin's Law Rep., O. S.*, 520, a question arose respecting the validity of martial rule, as established by General Jackson at New Orleans in December, 1815, MARTIN, Justice, delivering the opinion of the Court, made at the outset the following observation: "At the close of the argument on Monday last, we

thought it our duty, lest the smallest delay should countenance the idea that this Court entertain any doubt on the first ground, instantly to declare *viva voce* (although the practice is to deliver our opinions in writing) that the exercise of our authority vested by the law in this Court could not be suspended by any man.

"In any other State but this in the population of which are many individuals, who not being perfectly acquainted with their rights may easily be imposed on, it could not be expected that the judges of this Court should, in complying with the constitutional injunction, *in all cases to adduce the reasons on which their judgment is founded*, take up much time to show that this Court is bound utterly to disregard what is thus called *Martial Law;* if anything be meant thereby but the strict enforcing of the rules and articles for the government of the army of the United States established by Congress, or any act of that body relating to military matters on all individuals belonging to the army or militia in the service of the United States. Yet we are told that by this proclamation of martial law, the officer who issued it has conferred on himself over all his fellow citizens (within the space which he has described) a supreme and unlimited power, which being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them." The whole opinion is worthy of the most careful consideration.

From all this history, at which I have glanced so rapidly, it is manifest, that the toleration for a moment of military commissions for civilians is something new, and it is marvellous that it should ever have received the smallest countenance.

That it should have been so, is owing to the new and extraordinary circumstances in which we were suddenly placed; to our previous unacquaintance with large armies; to our inexperience of the evils of military rule; and, above all, to the absorption of almost every man's thought, will and action in the one great vital task of sustaining and augmenting the physical forces of the country for its struggle with rebellion.

Story on Const 1338. 1492
1 Kents Com 341. N a
Speech of H. Winter Davis.
House of Representatives
March 1865

Some of the more zealous apologists for martial rule by executive authority, have sometimes thrown out an intimation, that the language of this Court in *Luther* agt. *Borden* (7 *How.*, 1) gives it some countenance. But the slightest examination of the case will show, not only that it does not countenance, but that it does strongly discountence the idea of executive power as competent to establish martial law. It will be remembered that the plaintiff sued for a trespass committed by the defendant, an officer of militia, in entering his house to make an arrest, at a time when the State of Rhode Island was, *by its legislature*, made subject to martial law. At that time Rhode Island had no Constitution, but was governed according to a Charter from Charles II., which left her legislature as legally omnipotent as the English Parliament.

The question concerned only the validity of the Act of the State *Legislature*. The State Courts of Rhode Island had adjudged it valid. With this explanation, the following language of Chief Justice TANEY, the very judge who afterward decided Merryman's case, is most instructive:

"The remaining question is, whether the defendants, acting under military orders, issued under the authority of the Government, were justified in breaking and entering the plaintiff's house. In relation to the Act of the Legislature declaring martial law, *it is not necessary in the sense before us to inquire to what extent, or under what circumstances that power may be exercised by a State.*

"Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities.

"And unquestionably a State may use its military power to put down an armed insurrection, too strong

to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. *And if the Government of Rhode Island deemed the armed opposition so formidable, and so ramified through the State, as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority.*

"It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one, whom, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom or by whose order it is committed would undoubtedly be answerable.

"*We forbear to remark upon the cases referred to in the argument in relation to the commissions anciently issued by Kings of England to Commissioners, to proceed against certain descriptions of persons in certain places by the law martial.*

"*These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the petition of right in the reign of Charles the First.* But they

bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self defence, when assailed by an armed force; and the cases and commentaries concerning these commissions, cannot, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government."

Perhaps I ought not here to omit some mention of the proceedings of General Jackson, at New Orleans, in 1815, and the subsequent resolution of Congress, to refund the fine imposed upon him. This piece of history has been perverted into the sanction and support of martial rule. In reality it gives no such sanction or support. The refunding of the money was only a testimony to the good intentions of the General, but not in the least evidence of the legality of his action, or an argument for it. At the utmost, it fell far short of an act of indemnity, such as the British parliament is used to give to an act, illegal in itself, but done in anticipation of its subsequent ratification by an omnipotent parliament. The legal invalidity of General Jackson's action, in that case of actual siege and assault, bearing no analogy to the circumstances of the present case, needs no better demonstration than the judgment of the Supreme Court of Louisiana, in the case of Johnson *against* Duncan, which I have already quoted.

After this summary of decisions and opinions, we can readily appreciate the indignant protests with which our fathers mentioned the exercise of military power, and how steadily they declared and maintained its subordination to the civil. The maxim which they so often set in their "Bills of Rights," means nothing if military courts can in any circumstances superesde the civil, or subject civilians to their authority. See how carefully and strongly they have expressed themselves. They began with the Declaration of Independence, which enumerated among the grievances of the colonies, that the King of Great Britain had "affected to render the military independent of, and superior to the civil power."

By the Constitution of New Hampshire of 1783, it was

declared that "in all cases, and at all times, the military ought to be under strict subordination to and governed by the civil power;" by the Constitution of Massachusetts of 1780, that "no person can in any case be subjected to law martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the legislature;" by the Constitution of Pennsylvania of 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by the Constitution of Delaware of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by that of Maryland of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and control of the civil power;" by that of North Carolina, 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by that of South Carolina, 1778, "that the military be subordinate to the civil power of the State;" and by that of Georgia, 1777, that "the principles of the Habeas Corpus Act shall be part of this Constitution; and freedom of the press, and trial by jury, to remain inviolate forever."

After reading these, we may well exclaim, in the language of the Constitution of Massachusetts, that "a frequent recurrence to the principles of the Constitution is one of the things absolutely necessary to preserve the advantages of liberty, and to maintain a free government." What, then, was meant by these declarations of the Bills of Rights promulgated in that revolutionary period? Was it meant that the military must be subordinate in time of peace, but paramount in time of war? Were our fathers guarding against abuse, when there was no danger of it, or against it where there was danger; when the military were weak, or when they were strong; when the country had less need of their services, or when it had greater? No; they were afraid of that weak ~~praise~~ phrase uttered by the most timid of ancient politicians, Cicero, in the presence of that ablest and most daring of

usurpers, Julius Cæsar—"*Inter arma silent leges*"—which is completely foreign to American or English law, and for which nothing could atone, in the great orator himself, but his unhappy death, brought about in some degree by his vacillating policy and this unmanly maxim.

Here, then, if the Court please, I rest my argument, against the competency of the military commission which was convened at Indianapolis, in the autumn of 1864, for the trial of the petitioner.

It remains to consider what remedy, if any, the petitioner had for this unlawful judgment, and its threatened execution.

The great remedy provided by our legal and political system for unlawful restraint, whether upon pretended judgments, decrees, sentences, warrants, orders, or otherwise, is the writ of Habeas Corpus.

The writ of prohibition from Circuit Courts is not authorized by Congress, except to the District Courts.

Probably the State Courts might issue it, but that course would be more likely to lead to a collision than if the remedy came from the ~~present~~ federal tribunals.

And it would be, at the best, but a dilatory proceeding; and before it terminated, the mischief might be remediless.

The writ of Mandamus is altogether inappropriate.

The remedy which the petitioner asked in the present case was, "that under the Act of Congress, approved March 3, 1863, entitled "An Act relating to Habeas Corpus and regulating judicial proceedings in certain cases," "he may [might] be brought before this Court by writ of Habeas Corpus, or such other process as the Court [might] award for that purpose; together with the cause of his caption and detention; to do and receive whatsoever the Court [might], upon full and final hearing, order and adjudge in relation thereto, in pursuance of the Act of Congress aforesaid; and that, at all events, he [might] be delivered from said military custody and imprisonment; and if found probably guilty of any improper conduct, or offence, against the United States of America, turned over to the proper civil

tribunal for inquiry and punishment according to law, or for discharge from custody altogether."

The Act of Congress referred to in this prayer, after declaring that "a list of the names of all persons, citizens of States in which the administration of the laws has continued unimpaired in the said Federal Courts, who are now or may hereafter be held as prisoners of the United States, by order or authority of the President of the United States, or either of said secretaries, in any fort, arsenal, or other place, or State as political prisoners, or otherwise than as prisoners of war," proceeds to enact that "in all cases where a grand jury, having attended any of said Courts having jurisdiction in the premises, after the passage of this Act, and after the furnishing of said list as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said Court forthwith to make an order, that any such prisoner, desiring a discharge from said imprisonment, be brought before him to be discharged; and any officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute such order; and in case he shall delay, or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars, and imprisonment in the county jail for a period not less than six months, in the discretion of the Court." By the Third Section, it is provided that if the list is not furnished, any citizen may apply, on oath, for the order.

Whether, therefore, in the present case, the remedy should be by the technical writ of Habeas Corpus, or by an order in the nature of the writ, does not appear to be material. The first two questions certified, which relate to the remedy, are: 1st. Whether the writ of Habeas Corpus ought to be issued; and, 2d, Whether the petitioner ought to be discharged.

The writ and the order may be equally efficacious, but inasmuch as the order may certainly take the form of the writ, and as the proceedings upon the writ are well un-

derstood, and as that great writ of freedom lies as deep in the foundations of the law as in the hearts of freemen, the argument may be addressed to that alone. Recurring, therefore, to the propositions which I stated at the outset of my argument, I ask, was the privilege of the writ suspended as to the petitioner, when he claimed its protection? This leads me to consider first, to which of the great departments of the Federal Government does the power appertain of suspending it?

This power is derived, it is said, from two sources: first, the exigency of martial rule; and second, from the second subdivision of the Ninth Section of the First Article of the Federal Constitution.

As to the exigency of martial rule I have already discussed the subject so fully that I need not discuss it again. If the President or commander in chief of the army, navy, and militia in Federal service has not the power of martial rule over others than martial persons, he cannot control them by either trial or arrest, or detain them against the interposition, or in defiance of the judicial power. As a question under what is called the War Power of the President, I submit that it is no longer worth considering.

How then stands the question, upon the text of the Constitution? This is the language; "The privilege of the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." Is this a grant or a limitation of power? Looking only at the form of expression it would be regarded as a limitation; like the next subdivision, which is in these words:

"No bill of attainder or ex post facto law shall be passed." Regarding it, according to its place in the Constitution it should be deemed a limitation, for it is placed with six other subdivisions in the same Section, every one of which is a limitation. It implies that the power has been already granted, just as in the 4th and 6th subdivisions, a power is implied. Thus the 4th declares that "No capitation or other direct tax shall be laid unless in proportion to the census, or enumeration

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hereinbefore directed to be taken," and the 6th, that "no money shall be drawn from the treasury, but in consequence of appropriations made by law."

If the sentence respecting the Habeas Corpus, be, as I contend, a limitation, and not a grant of power, we must look into other parts of the Constitution to find the grant, and if we find none, making the grant to the President beyond his appointment as commander in chief, and it has been shown that there is none in that, it follows, that the power is in the Legislature, or the judicial department.

If, however, the provisions were deemed a grant of power, the question would occur, to whom is the grant made. The following considerations go to show that it is to be deemed as made to Congress:

First.—The debates in the Convention which framed the Constitution, seem at least to suppose, that the power was given to Congress, and to Congress alone.

Second.—The debates in the various State Conventions do most certainly proceed upon that supposition.

Third.—The place in which the provision is left, indicates, if it does not absolutely decide, that it relates only to the powers of Congress. It is not in the second article which treats of the executive department. It is not in the third, which treats of the judicial department. It is in the first article which treats of the legislative department. There is not another subdivision in all the seven subdivisions of the 9th Section, which does not relate to Congress in part, at least, and most of them relate to Congress alone.

Fourth.—The constitutional law of the mother country had been long settled that the power to suspend the privilege of the writ, or as it was sometimes called, suspending the writ itself, belonged only to Parliament. With this principle fairly seated in the minds of lawyers it seems incredible that so vast a change as conferring

the grant upon the executive, should have been so loosely and carelessly expressed.

Fifth.—The prevailing sentiment of the time when the Constitution was framed, was a dislike and dread of executive power. It is hardly to be believed that so vast and dangerous a power would have been conferred upon the President, without providing some safeguards against its abuse.

Sixth.—Every judicial opinion, and every commentary on the Constitution up to the period of the rebellion treated the power as belonging to Congress, and to that department alone.

Taking thus the context, the universal understanding of the time, the contemporaneous exposition, the subsequent commentaries, and the political reasons which may be supposed to have affected the statesmen of that day, the argument appears to be cogent and conclusive, that the power of suspending the privilege of the writ of Habeas Corpus appertains to thelegislative department of the government, and to that alone. It has I know been argued that there is an incongruity in authorizing Congress to suspend its own law. This is too narrow a view of the subject. The States have judicial establishments and can and do issue writs of Habeas Corpus. Indeed, it may be regarded as a provision made rather in reference to the writ of Habeas Corpus in the States, than to the writ as likely to be issued under the authority of Congress.

The straits to which the country was reduced during the late wicked rebellion, and the omission of Congress for two years to authorize the suspension of the privilege, gave rise to a series of discussions on the subject. Most of the writers, indeed, I believe all but three, took decided ground for the interpretation, which I submit is the true one. One of the three supposed the power resided in the judicial department. Among those who thought it be-

longed to the executive, there was one so able and distinguished that I cannot forbear mentioning his name in this connection. Horace Binney, "*clarum et venerabile nomen*," argued, with all his ability, for that interpretation which gave the power to the President, to be exercised not in a military but in a civil capacity. The authority of that great man, the acknowledged head of the Bar of his country, is so great that if it could not give the interpretation an adequate sanction, nothing else may be expected to do it.

If it were assumed that the power of suspending the privilege of the writ belongs to the judicial department, it is quite clear, that the present is a case where the writ would not be denied by the courts, or any of its privileges withheld. Supposing, however, the power to belong to Congress, as I have endeavored to show that it does, we find it exercised by the Act of March 3, 1863, and by none other. The first section of that Act is as follows:

"That during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of Habeas Corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled in answer to any writ of Habeas Corpus, to return the body of any person or persons detained by him by the authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner, under authority of the President, further proceedings under the writ of Habeas Corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue."

Without stopping to consider whether the power could be delegated by Congress, or if it could, whether the delegation could be made in terms so general, I pass to an examination of the President's action under the Act. There were two proclamations on the subject issued by

him afterwards. One was on the 15th of September, 1863, and declared;

"That the privilege of the said writ shall now be suspended throughout the United States, in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders, or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted, or mustered, or enlisted in, or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules and regulations prescribed for the military or naval forces, by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service."

The proclamation of July 5, 1864, related only to the State of Kentucky.

If therefore, for the sake of the argument, we admit, that when the petitioner was first arrested, the privilege of the writ was suspended as to him, by virtue of the Act of March, 1863, and the President's proclamation of September 15, 1863, it is nevertheless certain, that under the 3d Section of the Act, the suspension ceased at the end of twenty days, from the 27th of January, 1865, that is on the 17th of February of that year. A term of the Circuit Court of the United States, was held on the 2d of January, 1865, and adjourned on the 27th of the same month. At this term a grand jury was empanneled, sworn, and charged, and adjourned without finding any indictment or presentment against the petitioner. The sentence against him was approved and promulgated more than two months afterwards. Therefore, by this Act of Congress, duly passed and approved by the President, the petitioner was entitled to the writ, or an order in the nature of the writ, that he might be discharged.

And so we submit to the Court, that the answers to the three questions, certified by the Court below, should be, to the first, that, on the facts stated in the petitio

and exhibits, a writ of Habeas Corpus ought to be issued according to the prayer of the petitioner; to the second, that, on the same facts, the petitioner ought to be discharged; and to the third, that the military commission had not jurisdiction to try and sentence the petitioner, in manner and form as in the petition and exhibits is stated.

These great questions, than which greater never yet came before this most august of human tribunals, are now to receive their authoritative and last solution. The judgment here to be pronounced will, I trust, establish the liberty of the citizen on foundations never more to be shaken, and will cause the future historian of our greatest struggle to write that, great as were the victories of our war, they were equalled in renown by the victories of our peace.

DAVID DUDLEY FIELD,

Of Counsel for the Petitioner.

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APPENDIX.

I.

Earl of Lancaster's Case.

1 *Blackstone Com.*, 413.

"Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes (Hist. C. L., c. 2), in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice, according to the laws of the land. Wherefore Thomas Earl of Lancaster being condemned at Pontefract, 15 Ed. II., by martial law, his attainder was reversed 1 Ed. 3, because it was done in time of peace (2 Brad. App. 59). And it is laid down (3 Inst. 52) that if a lieutenant or other that hath commission of martial authority doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder, for it is contrary to Magna Carta (cap. 29)."

1 *Hale Pleas of the Crown* (Dogherty's Ed. London, 1800), pp. 499, 500.

"If in time of peace a commission issue to exercise martial law, and such commissioners condemn any of the King's subjects (not being listed under the military power), this is without all question a great misprision and an erroneous proceeding, and accordingly adjudged in parliament in the case of the Earl of Lancaster, Parl. 1 Ed. 3.

Ib., p. 344.

"CLAUS. 1 *E.* 3, *part.* 1, *m.* 21 *dors.* Thomas Earl of Lancaster was condemned to death, as a traitor by Edward II., at Pontefract. Henry, his brother, brought a petition of error in the parliament of 1 E. 3 upon that judgment; the record was removed in these words:

"'Pleas of the Crown before our lord the King Edward, son of our lord the King Edward, held in the presence of our lord the king himself at Pontefract on the day of June next before the Feast of the Annunciation of the Blessed Virgin Mary, in the fifteenth year of his reign.

"'Thomas Earl of Lancaster being taken for treasons, homicides, arsons, robberies and divers other felonies, and being brought before our lord the king himself, in the presence of Edmund Earl of Kent [and six others named] the barons and other magnates of the king, our lord the king, remembered that the same Thomas, a liege man of our lord the king, came at Burton-on-Trent, together with Humphrey de Bohun, formerly Earl of Hereford, found to be a traitor to the king and kingdom with colors flying at Boroughbridge, in war against our lord the king, and there slain, and Roger Damory adjudged to be a traitor, and other traitors and enemies of the king and kingdom, with colors flying, and resisted and impeded in hostile force as of war, for the space of three days, our lord the king himself and his men and servants from passing over the bridge of the said town of Burton, &c. And hence, our lord the king, having respect to the thus great crimes of said Earl Thomas, and his misdeeds and his great ingratitude, had no cause to extend in the premises any grace to the said Earl Thomas, to pardon him the aforesaid punishments adjudged against him; yet because the same Earl Thomas was born of an excellent and most noble family, our lord the king of his regard for the said family, of his special grace remits to the said Earl Thomas the execution of two of the punishments adjudged, as aforesaid, to wit: that the same Earl Thomas be not drawn nor hung, but that execution only be done upon the same Earl Thomas, that he be beheaded.

"'Thereupon the record being read in presence of our lord the king, the nobles and great men of the kingdom, and others in this parliament, he assigned these errors: 1. That there was error in this: that although when any liege man whatever of the king be taken in time of peace for seditions, homicides, robberies, arsons and other felonies, and be brought into any court whatever of our lord the king, he ought for such seditions and other

felonies charged against him, by the law and custom of the kingdom, to be arraigned, and put to answer, and then by the law, &c., to be convicted, before he be adjudged to death; yet the said Earl Thomas, a liege man of our lord and father the king, aforesaid, &c., was taken in time of peace, and brought before the king himself; and the said our lord and father the king, &c., remembered that the same Thomas was guilty of the seditions and other felonies in the aforesaid record contained; without this, that he arraigned him therefor or put him to answer as is the custom according to the law, &c., and thus, without arraignment and answer, the same Thomas, of error and contrary to the law of the land was in time of peace adjudged to death, notwithstanding that it is notorious and manifest that the whole time in which the said misdeeds and crimes contained in the said record and proceedings were charged against the said Earl, and also the time in which he was taken, and in which our said lord and father the king remembered him to be guilty, &c., and in which he was adjudged to death, was a time of peace, and the more especially as throughout the whole time aforesaid the Chancery and other courts of pleas of our lord the king were open, and in which right was done to every man, as it was used to be; nor did the same lord the king in that time ever ride with standard unfurled; the said lord and father the king, &c., in such time of peace ought not against the same Earl thus to have remembered nor to have adjudged him to death without arraignment and answer. He says also: 2. That there is error in this, that although the said Earl Thomas was one of the lords and magnates of the kingdom, and it was contained in the great charter of the liberties of England 'that no free man be taken, imprisoned, or be disseised of his freehold or liberties or free customs, or outlawed or exiled, or any otherwise destroyed; nor will our lord the king pass upon him nor condemn him but by lawful judgment of his peers or by the law of the land;' the said Earl Thomas, by the record of the king, as is aforesaid 'in time of peace' was of erroradjudged to death, without arraignment or answer or lawful judgment of his peers against the law, &c., and against the tenor of the said great charter; and therefore, as brother and heir of Thomas, prays that the judgment be annulled and he restored to his inheritance; and the aforesaid record and proceedings, &c., being seen and more fully understood, for the errors aforesaid and others in the same record and proceedings found, therefore, it is considered by our lord the king himself, the lords, magnates,

and all the commons of the kingdom in this parliament, that the said judgment rendered against the said Thomas, for error be revoked and held for nought, and that the said Henry, as brother and heir of the said Earl Thomas, be admitted to sue for and have due process hereupon to be made as is used, and have a writ out of chancery; and that the justices in whose pleas the said record and proceedings are enrolled cause the same record and proceedings to be avoided and held for nought, &c.' (P. 15, Ed. 2, B. R. Rot. 69, and P. 39, Ed. 3, Rot. 49, *coram Rege.*)

"This notable record even before the statute of 25 Ed. 3 [the statute of treasons], gives us an account of these things: 1. That in time of peace no man ought to be adjudged to death for treason or any other offense, without being arraigned and put to answer. 2. That regularly, when the king's courts are open, it is a time of peace in judgment of law. 3. That no man ought to be sentenced to death by the record of the king without his legal trial *per pares.*"

Hume, History of England, Ch. 14, *vol.* 2, *p.* 159.

"The king had now got the start of the barons, an advantage which, in those times, was commonly decisive; and he hastened with his army to the marches of Wales, the chief seat of power of his enemies, whom he found totally unprepared for resistance. Many of the barons in those parts endeavored to appease him by submission; their castles were seized, and their persons committed to custody, But Lancaster, in order to prevent the total ruin of his party, summoned together his vassals and retainers; declared his alliance with Scotland, which had long been suspected; received the promise of re-enforcement from that country, under the command of Randolf, Earl of Murray, and Sir James Douglass; and being joined by the Earl of Hereford, advanced with all his forces against the king, who had collected an army of thirty thousand men, and was superior to his enemies. Lancaster posted himself at Burton-upon-Trent, and endeavored to defend the passage of the river; but being disappointed in that plan of operations, this prince, who had no military genius, and whose personal courage was even suspected, fled with his army to the north, in expectation of being there joined by his Scottish allies. He was pursued by the king, and his army diminished daily, till he came to Boroughbridge, where he found Sir Andrew Harcla posted with some forces on

the opposite side of the river, and ready to dispute the passage with him. He was repulsed in an attempt which he made to force his way; the Earl of Hereford was killed; the whole army of the rebels was disconcerted: Lancaster himself was become incapable of taking any measures either for flight or defence; and he was seized without resistance by Harcla and conducted to the king. In those violent times, the laws were so much neglected on both sides, that, even when they might, without any sensible inconvenience, have been observed, the conquerors deemed it unnecessary to pay any regard to them. Lancaster, who was guilty of open rebellion, and was taken in arms against his sovereign, instead of being tried by the laws of his country, which pronounced the sentence of death against him, was condemned by a court martial and led to execution."

II.

Mititary Commissions of Chas. I.

Rymer's Foedera XVIII. 254.

"Charles by the Grace of God &c. To our right trusty and well beloved cousin Edward, Viscount Wimbleton, Lord Marshall of our Army and to our trustie and welbeloved Sir William St. Leger Knight, Serjeant Major of our Army [and 23 others]:

"Whereas upon the Retourne of Our Fleete, Wee have alreadie directed that non of the Soldiers imployed in that Service, and which shall retourne in any of those Shipps shall be disbanded or departe from their Colours, but shall continue under the Commaund of those under whom they then served, Wee having present occasion to use their Services again, and yet Wee shall be inforced for a time to lodge and billett the said Soldiers in severall Places in and about Our Towne of *Plymouth* and in Our Counties of *Devon* and *Cornewall* where, with most Convenience for the Soldiers and least Trouble to the Countrey itt may be best performed, untill Wee shall have Opportunitie to ymploye them, which We intend to doe with all Expedition; And to the end that all Disorders and Outrages, to the Disturbance of Our Peace and the Prejudice of our loveing Subjects may be tymely

prevented, Wee being more desireous to keepe Our People from doeing Mischiefe than to have cause to punish them for doeing the same :

"Have, of the speciall Trust and Confidence We have reposed in your approved Wisdomes and Fidelities, appointed you to be our Commissioners and by theis Presents doe give unto you or any three or more of you, full Power and Authoritie in all Places within Our said Counties of *Devon* and *Cornwall* and either of them, as well within the said Town of *Plymouth* or anie other Towne Libertie or Place as without, within Our said Counties of Devon and Cornwall or either of them, to proceede according to the Justice of Marshall Lawe against such Soldiers or other dissolute Persons joining with them or anie of them, as dureing such Time that anie of our said Troopes or Companies of Soldiers shall remayne or abyde thereabouts, and not be transported thence, shall within any the Places or Precincts aforesaid att anie Time after the Publication of this Our Commission, committ any Robberies, Felonyes, or Mutynies, or other Outrages or Misdemeanors, which by Marshall Lawe should or ought to be punished with Death, and by such summarie Course and Order as is agreeable to Marshall Lawe, and is used in Armies in tyme of Warres, to proceed to the Triall and Condempnation of such Delinquents and Offendors, and them to cause to be executed and putt to Death according to the Lawe Marshall for an Example of Terror to others, and to keepe the rest in due Awe and Obedience.

"To which Purpose Our Will and Pleasure is that you cause to be erected such Gallowes and Gibbetts, and in such Places within the said Counties or either of them, as you shall think fitt, and thereupon to cause the same Offenders to be executed in open View, that others may take warning thereby to demeane themselves in such due Order and Obedience as good Subjects ought to do, straightlie chargeing and commaunding all Mayors, Sheriffs, Justices of Peace, Constables, Bayliffs and other Officers, and all other Our loveing Subjects whatsoever upon their Allegiance to Us and Our Crowne, to be be (*sic*) ayding and assisting to you or such three or more of you as aforesaid in the due Execution of this Our Royall Commaundment, and theis Presents shal be unto you and everie of you sufficient Warrant and Discharge for the doeing and executing and causing to be done and executed all and everie such Act and Acts, Thing and Things as anie three or more of you as aforesaid shall find requisite to be done concerning the Premises.

"In Witnes whereof &c.
Witnes, &c
Teste Rege Apud *Hampton Court vicesimo octavo Die Decembris.*
Per Breve de Privato Sigillo, &c.
A. D. 1625."

Ib., 763.

Similar Commission "to proceed according to the Justice of Martiall Lawe against such Soldiers or Marriners, or other dissolute Persons joyneing with them or any of them as within the said County [of Kent] or any Parte thereof, shall at any tyme after the Publication of this Our Commission committ any Robbery, Felony, Mutiny or other Outrage or Misdemeanour or which shall withdrawe themselves from their Places of Service or Charge as aforesaid or shal be found within the said Countie or any Parte thereof, which by the Martiall Lawe should or oughte to be punished with Death and by such summary Course" &c *ut supra.*

"Witnes Our Selfe at Canbury the fourth day of October [1626]. Per ipsum Regem."

III.

Extracts from the Petition of Right.

The Petition of Right (5 Statutes of the Realm, fol. 24).

"Whereas also by authority of Parliament in the 25th year of the reign of King Edward III., it is declared and enacted, That no man shall stand fore-judged of life or limb against the form of the Great Charter and the laws and statutes of this Realm; And by the said Great Charter and other the laws and statutes of this your Realm, no man ought to be adjudged to death but by the laws established in this your Realm, either by the customs of the same realm or by acts of Parliament;

"Whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your Realm; Nevertheless of late, divers *Commissions,* under your Majesty's great Seal, have issued forth, by which certain persons have been assigned and appointed Commissioners with power and authority to proceed, within the land,

according to the justice of martial law, against such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage, or misdemeanor whatsoever; and by such summary course and order as is agreeable to martial law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial:

"By pretext whereof some of your majesty's subjects have been by some of the said Commissioners put to death, when and where if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might and by no other ought to have been judged and executed:

"And also sundry grievous offenders by color thereof claiming an exemption have escaped the punishment due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborn to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions and all other of like nature are wholly and directly contrary to the said laws and statutes of this your realm:

"They do therefore humbly pray your most excellent majesty * * * that the aforesaid commissions for proceeding by martial law may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by color of them any of your majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land."

"The petition was read, and then the clerk read this answer: 'Soit droit fait comme il est desire.'" (8 Parl. Hist. 202, 7th June, 1628.)

IV.

English Acts suspending the Privilege of the Writ of Habeas Corpus.

List of English Acts "to empower his Majesty to secure and detain such persons as his Majesty shall

suspect are conspiring against his Majesty's person or government."

1 W. and M., St. 1, Ch. 7, 19.
7 and 8 W. 3, Ch. 11.
6 Anne, Ch. 15.
1 Geo. 1, Ch. 8, 30.
17 " 2, Ch. 6.
19 " " " 1.
17 " 3, " 9.
34 " " " 54.
35 " " " 1.
38 " " " 36.
39 " " " 44.
39 and 40 Geo. 3, Ch. 32.
41 Geo. 3, Ch. 26.
57 Geo. 3, Ch. 3 and 55, p. 193 (which see below).
11 and 12 Vict., Ch. 35.

These acts are generally in the form of which the following (57 Geo. 3, Ch. 55) is a specimen :

" An act to continue an act, to empower his Majesty to secure and detain such persons as his Majesty shall suspect on conspiring against his person and government (30th June, 1817)."

§ 1. Enacts that " all or any person or persons, that are or shall be in prison, within that part of the United Kingdom called Great Britain, at or upon the day on which this act shall receive his Majesty's royal assent, or after, by warrant of his said Majesty's most hon. privy council, signed by six of the said privy council, for high treason, suspicion of treason or treasonable practices, or by warrant signed by any of his Majesty's Secretaries of State, for such causes as aforesaid, may be detained in safe custody without bail or mainprize, until the 1st day of March, 1818, and that no judge or justice of the peace shall bail or try any such person or persons so committed, without orders from his said Majesty's privy council, signed by six of the said privy council, until the first day of March, 1818, any law or statute to the contrary notwithstanding.

§ 2. " That the act made in Scotland, in the year of our Lord, 1701, intitled an act for preventing wrongous imprisonment, and against undue delays in trials, in so far as the same may be construed, to relate to the cases of treason, and suspicion of treason, with respect to

persons so committed as aforesaid, be suspended until the first day of March, 1818, and until 'said day' no judge, justice of the peace, or other officer of the law of Scotland, shall liberate, try, or admit to bail, any person or persons that is, are, or shall be in prison in Scotland, under a warrant or warrants, signed as aforesaid, for such causes as are aforesaid, without orders from his said Majesty's privy council, signed by six of the said privy council.

§ 3. "Provided always, that from and after the first day of March, 1818, the said persons so committed, shall have the benefit and advantage of all laws and statutes in any way relating to, or providing for 'the liberty of the subjects of this realm.'"

Act for Ireland.—The 11 *and* 12 *Vict., Ch.* 35, *p.* 165, 25*th July*, 1848, provides that:

§ 1. Persons imprisoned in Ireland at the date of this Act or after, by warrant of six privy councillors, "for high treason, or treasonable practices, or suspicion of high treason or treasonable practices," may be "detained in safe custody without bail or mainprize, until March 1st, 1849," and not to be bailed or tried without order of the Irish privy council, until March 1st, 1849.

§ 2. The persons to whom such warrants are directed shall detain such persons, as lawful prisoners.

V.

Geoffroy's Case, in France.

Court of Cassation, June 29*th*, 1832 (24 *Journal du Palais, p.* 1218, *seqq*).

"*The laws and decrees in regard to creating a state of siege, must be carried into execution in all points not contrary to the Constitutional Charter.*

"*But Art.* 103, *Decree of* 24 *Dec.* 1811, *being irreconcileable with Art.* 53 *and* 54 *of the Charter of* 1830, *placing a city in a state of siege, cannot have the effect of conferring jurisdiction on military commissions* (*conseils de guerre*) *over persons who are not in the army, nor impressed with a military character. Law* 22 *Messidor, year IV, Art.* 1.

"Geoffroy *vs.* Le Ministere Public.

"A royal order dated June 6th, 1832, had put Paris in a state of siege; it was based on the necessity of repress-

ing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th; on attacks upon public and private property; on assassinations of national guards, troops of the line, municipal guards and officers in the public service; and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks.

"The Cour Royale, called to meet in extra session by order of the first president, to pass by way of review (*evocation*) or otherwise, upon the political occurrences of the 5th and 6th of June, rendered the following judgment on the 7th of June, all the chambers being united: On hearing the Procureur General on his motion, deciding on the proposition of one of its members to cause to be transmitted for review, the record relative to criminal acts committed on the 5th and 6th of the present month; Whereas, by the order dated yesterday, the city of Paris has been placed in a state of siege, and whereas, by the terms of Art. 101, of the Decree of Dec. 24, 1811, passed to carry out the laws of July 8, 1791, and 10th Fructidor, year V, the effect thereof is to transfer to the military commandant, the power vested in the civil judges for the maintainance of order and police.

"'And whereas, the occurrences which occasioned the placing of the City of Paris in a state of siege, must be subjected to this rule of law, although anterior thereto:

"'It is declared that no ground for a review exists'.

"The publicity encountered by this decision raised the question of the constitutionality of the order, and the no less weighty question of the jurisdiction of military commissions over acts done and ended before the order declaring the state of siege was inserted in the *Moniteur* and the *Bulletin des Lois*.

"As early as June 10th, the *Gazette des Tribunaux* published a carefully considered opinion on these points by Me. Ledru Rollin, of the Paris bar. The ball thus being opened, the opposition press soon after collected the opinions of several notabilities of the order of advocates of the Court of Cassation, and the concurring opinions of a number of the bars of the kingdom. All these opinions increased the arguments against the constitutionality of the order, its retroactive force, and the jurisdiction of military commissions.

"The military commissions having taken cognizance of the cases, the successive defendants at their bar excepted in vain to their jurisdiction. The exceptions were entered of record, saving the right to pass upon them in deciding upon the merits. But it must be noted that this

answer to the exception on the ground of want of jurisdiction, did not afford a decision on the exceptions. According to the law of the 13th Brumaire, year V, which prescribes the procedure to be pursued before military commissions, the latter must give judgment without adjournment; military judges are both judges and juries; they have but one question to answer, (Art. 30, of the law cited): 'Is N., the accused, guilty?' Being thus bound under the law which created them, by the double duty of giving judgment without adjournment, and of answering a complex question, the question of their jurisdiction could not be explicitly decided by the military commissions themselves; judgments of not guilty left the point vaguely undecided; on the other hand the counsel for the defence being unable after discussing it, to avoid a discussion of the merits without putting the fate of the accused in jeopardy, relied upon the exercise of the discretionary power which might be adopted by military judges from the new law, permitting juries to put questions upon trials for the purpose of discovering extenuating circumstances.

"However, more than one capital sentence was pronounced. Among the accused, Michael Augustus Geoffroy, designer, of Paris, was by a decision of the second military commission of Paris, on the 18th of June, by a majority of 6 to 1, declared guilty of an attack with intent to subvert the government and to excite civil war. He was consequently condemned to death, in accordance with Art. 87, 89 and 91, of the Penal Code and the law of 18th Germinal, year VI.

"Geoffroy immediately appealed to the Council of Revision and the Court of Cassation."

[The latter court made an interlocutory order that the record should be brought into their clerk's office to await their further judgment. This having been done and the reporting counsellor having stated the question raised, M. Odilon Barrot, of counsel for the appellant, stated and argued three propositions as the grounds of his appeal, as follows:]

1st. "Placing the City of Paris in a state of siege by a mere Order, when the city has not been invested and the communications have not been interrupted is an illegal act, and deemed not to exist. 2d. In case the state of siege be considered legal and constitutional, it is impossible that it should result in withdrawing citizens from their natural judges and in obliterating, as regards them, the 53d and 54th Articles of the Charter."

[The third point related to the retroactive effect of the Order.]

"1st. How is the question in this case to be stated? Can any one ask whether the government is authorized to despoil its citizens of the guaranties of a jury, not only for ordinary misdemeanors but even for violations of the laws of the press? This would be doing violence to the Charter which establishes trial by jury. Will any one put the question thus: Is the City of Paris besieged? This would be doing violence to common sense. Where, I ask, are the rebels investing the city and putting it in a state of siege? Are not the communications unobstructed? No, the city is not besieged; there is no state of siege; the siege is a fiction; this fiction is not lawful.

"2d. The laws of Prairial, year III, and Ventose, year IV, are those on which the pretended jurisdiction of military commissions is founded. A military commission, it is said, is not an extraordinary, special tribunal. It is a permanent court. This assertion is refuted by the statutes and decisions. The laws of the years III and IV, were re-cast and re-enacted by the law of Pluviose, year IX, which created special tribunals, and subsequently by that of 1815, which created provost's courts as a part of the ordinary administration of justice. This has been distinctly decided by the Court of Cassation in the cases of military emissaries and spies; of enticements to desert; of highway robbers; and of all persons brought within the scope of the laws conferring special jurisdiction. I add, that according to these laws, the decisions of this court did not bring within the jurisdiction of military courts such individuals as were prosecuted for having formed a part of an armed assemblage, except in those cases where they were taken in the assemblage itself.

"Therefore, as regards the persons placed by the events of June in the hands of the executive, some exceptional, extraordinary jurisdiction was required, and it is this very jurisdiction which the 53d and 54th articles of the Charter have banished never to return. Listen to M. Dupin commenting on these articles from the rostrum: 'In order to prevent every possible abuse, we have added to the former text of the Charter 'under what name or denomination soever;' for specious names have never been wanting for bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts.' This is the principle which was applied in the ordinance of 1830, relating to juries in Corsica. This ordinance declares that the acts of the government which had created in Corsica—not a military tribunal but—a supreme court, an ordinary jurisdiction, created by a senatus-consultum, confirmed

by divers decrees, and sanctioned by a crowd of decisions, be and remain abrogated. Then, if the jurisdiction of judges for life, surrounded by guaranties, deciding with the solemnity of ordinary justice, has been considered extraordinary, what shall military commissions be called, which decide without adjournment, as soon as the case is before them, without any body similar to a grand jury having first declared the existence of the indictment, which decides without confronting witnesses, without a challenge, and whose judgments are executed within twenty-four hours? The most enormous of exceptions, the most monstrous of special jurisdictions is a court which judges a non-military person by accidental authority. This tribunal, to use the epithet of the decree of the Convention of the 28th Thermidor, year III, can render nothing but revolutionary judgments; judgments which, by returning to true principles, were declared null and void by the Convention itself.

"It is objected that the special laws concerning states of siege have survived the Charter, and that they compel the establishment of military justice. No; even putting aside the Charter of 1830, there is no law which, within the land, and excepting the case of an investment, permits a military chief to place a people beyond the pale of their constitutional guaranties. There are three laws which relate to a state of siege, that of 1791, that of the year V, and the Decree of Dec. 24th, 1811. The law of 1791 provides what shall be done as regards places of strength, in the three situations in which they may be placed; peace, war, siege; it derogates in no respect from the Constitution of 1791, according to which no person can be accused or condemned except in virtue of a declaration of a jury on the facts, and of judges on the law. The law of the 17th Fructidor, year V, fills a void in the law of 1791; it provides for the case where a place of strength in the interior should be in an analogous position to that of a place of strength, that is, invested by forces of the enemy, or by rebels. How is it possible to make out of a war measure, a measure of public safety; a measure of suspending the constitution, and of creating a dictatorship towering above the institutions of the country? Can any one at this day, give the name of law to an act which sanctioned the 18th of Fructidor, and the establishment of renewed proscriptions? As to the decree of 1811; that, in its letter, and in its spirit, was no measure of public safety, but an act of military police prescribing a rule in regard to places of strength; this decree has perished like all exceptional measures, by which the head of the

government had arrogated to himself the power of modifying the Constitution; it was one of the causes of his downfall."

[The public prosecutor replied to the first ground taken by the defence, as follows:]

* * * * "The right to declare a state of siege is confided exclusively to the chief magistrate, or the executive power; to the king, under the responsibility of his ministers, by the law of 1791; to the executive directory by the laws of the year V, under the duty of informing the legislative body, which, at that time, was to be in permanent session; to the emperor by the decree of 1811; in a word, always to the executive power, as governed by the necessities of the case and the law of public safety, and solely capable of appreciating the demand for the measure."

[To the second ground:]

* * * * "What is the character and nature of the Charter? It is the usual and ordinary constitution of the country, the basis of our public law. What is a state of siege? A violent, extraordinary state of things based upon the necessity of defence, and of providing for the common safety, attacked or threatened to be attacked by a war, or aggression of some kind. At such a time ordinary misdemeanors and crimes may become military misdemeanors and crimes, subject to the laws of war, and triable by its courts. The authority of military commissions is therefore necessarily connected with a state of siege. Without it a state of siege would be nothing but an abstraction; the laws which govern it belong to a state of things entirely outside of ordinary law. The 53d and 54th Articles of the Charter are cited against us. Art. 53 merely reproduces Art. 62 of the Charter of 1814, and it has always been held that the 'natural judges' of a person accused, are those fixed by the law for the case or person to be judged. Art. 54 strengthens the prohibition contained in Art. 53. But, in the first place, permanent military commissions are not extraordinary commissions, newly and specially created for specific cases; they are recognized by a course of legislation; they are not abolished by the Charter. This has been held several times by this court under the Charter of 1830, as well as that of 1814. These tribunals are not an exception to the usual order of things, they are the usual rule of a different order of things. The Charter did not, and could not provide for a state of siege; and never intended that the government should stand disarmed, where circumstances have once showed the necessity of this excep-

tional state, outside of ordinary law. It follows that military commissions do not take cognizance by force of the order of the 6th of June, but as a consequence of the state of siege, and because military tribunals belong to a state of siege, and are the usual judges, recognized as such by law, in cases by which this state is created and constituted, which is not the normal state provided for by the Charter."

[On the 29th of June the Court gave judgment as follows:]

"*Per Cur.* (After advisement in the council-chamber). Whereas neither the Charter nor any subsequent law treats of the laws and decrees which govern a state of siege, and whereas these laws and decrees must therefore be carried into execution in all points not contrary to the Charter; having considered the Art. 77, L. 27 Ventose, year VIII, in these words: 'No appeal can be taken against final judgments of *juges de paix*, except for want of jurisdiction or for exceeding the same, nor against the judgments of military tribunals of land and sea, except for the said causes, taken by a citizen not in the army and not impressed by law with a military character by reason of his duties;' Art. 1, L. 22 Messidor, year IV, as follows: 'No crime is military, unless committed by a person forming a part of the army; no other person can be brought, as a defendant, before judges appointed by military law;' Art. 53, 54 and 56 of the Charter: 'No person can be withdrawn from his natural judges.' 'Consequently extraordinary commissions and tribunals cannot be created under what title or name soever.' 'The institution of juries is continued;' Art. 69 which extends the cognizance of juries to crimes of the press, and political crimes, and the law of October 8, 1831, which defines political crimes; Art. 103, Decree of December 24, 1811, as follows: 'As regards all crimes the cognizance of which the commandant has not decreed fit to be left to the ordinary courts, the duties of officers of judiciary police are performed by a military provost, chosen as far as possible from the officers of *gendarmerie*, and the ordinary courts are replaced by the military courts;' and whereas this provision is irreconcileable with the letter and the spirit of the above cited articles of the Charter; and whereas military commissions are ordinary tribunals solely for the judging of crimes committed by the military or persons impressed by law with a military character, and become extraordinary tribunals when they extend their jurisdiction to crimes or misdemeanors committed by non-military citizens; and whereas Geoffroy, brought be-

fore the 2d military commission of the first Military Division, is neither in the army nor impressed with a military character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction and the provisions of Art. 53 and 54 of the Charter, and those of the laws above cited: On these grounds, the court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom and especially the judgment of condemnation of the 18th June, instant. And in order that further proceedings be had according to law, *remands* him before one of the judges of instruction of the court of first instance of Paris," &c.

Supplement a la Repertoire du Journal du Palais (1857), *vol. I., p.* 707, *Art.* 50, 54, 55.

"The questions of jurisdiction, etc., discussed in 1832, arose again in consequence of the events of June, 1848, and new appeals were taken to the Court of Cassation; the Court was no longer confronted by the Charter of 1830, and this time declared that military commissions had jurisdiction to try persons though not of the army, accused of having taken part in the insurrection of June, 1848. (*Journ. du Palais, vol. I.*, 1850, *p.* 223.)

"Art. 106 of the Constitution of 1848, for the purpose of putting end to all judicial controversies as to the legality of a state of siege and its consequences, declared that a law should be passed to fix the cases in which a state of siege might be declared and determined at the same time the forms and effects of this measure. This law was passed by the Legislative Assembly and promulgated August 9, 1849, [which enacts as follows: '*Art.* 2. The National Assembly solely can declare a state of siege, except as in hereafter excepted. *Art.* 3. In case of prorogation of the National Assembly, the President of the Republic may declare a state of siege, with the advice of the council of ministers. The President, when he has declared a state of siege, must immediately inform the commission created by virtue of *Art.* 32 of the Constitution, thereof, and, according to the importance of the circumstance, convoke the National Assembly. The National Assembly from the time when it meets, maintaines or abolishes the state of siege'], and still governs this important matter, except however one modification resulting from Art. 12 of the Constitution of June 14, 1852, as

regards the authority invested with the right of declaring a state of siege. By the terms of the Constitution of 1852, 'the Emperor has the right of declaring a state of siege in one or more departments, provided that he inform the Senate thereof, with the least delay.'"

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VI.

EXTRACTS FROM THE DEBATES IN THE FEDERAL CONVENTION, SHOWING HOW THE PROVISION AS TO THE HABEAS CORPUS CAME INTO ITS PRESENT SHAPE.

(*May 29th*, 1787.) "Mr. Charles Pinckney, one of the deputies of South Carolina, laid before the house for their consideration, the draft of a Federal Government, to be agreed upon between the free and independent States of America." (1 *Elliott's Deb.*, 145.) * * *

"ART. VI. [Last clause but one.] All laws regulating commerce shall require the assent of two thirds of the members present in each house. The United States shall not grant any title of nobility. The Legislature of the United States, shall pass no law on the subject of religion, nor touching or abridging the liberty of the press; nor shall the privilege of the writ of Habeas Corpus ever be suspended, except in case of rebellion or invasion." (1 *Ib.*, 148.) * * * * * * *

"ART. IX. [Last clause.] All criminal offences (except in cases of impeachment) shall be tried in the State where they shall be committed. The trials shall be open and public, and be by jury." (1 *Ib.*, 149.)

July 26. "The propositions offered to the Convention by Mr. C. Pinckney, * * were referred to the committee" [of five]. (1 *Ib.*, 223.)

"*Draft of a Constitution, reported by the committee of five, Aug.* 6, 1787. (*Ib.*, 224.)

"ART. XI. Sect. 4. The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed, and shall be by jury." (1 *Ib.*, 229.)

"MONDAY, *Aug.* 20, 1787. In Convention.—Mr. PINCKNEY submitted to the House, in order to be referred to the committee of detail, the following propositions (5 *Ib.*, 445): * * * *

"'The privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner, and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding—— months.

"'The liberty of the press shall be inviolably preserved.

"'No troops shall be kept up in time of peace, but by consent of the Legislature.

"'The military shall always be subordinate to the civil power; and no grants of money shall be made by the Legislature, for supporting military land forces, for more than one year at a time.

"'No soldier shall be quartered in any house, in time of peace, without consent of the owner.' (1 *Ib.*, 249.)

"These propositions were referred to the committee of detail, without debate or consideration of them by the House.'" (5 *Ib.*, 446.)

"TUESDAY, *Aug.* 28, 1787. It was moved and seconded to amend the 4th section of the 11th article, to read as follows:

"'The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the Legislature may direct;' which passed in the affirmative." (1 *Ib.*, 270.)

"Mr. PINCKNEY, urging the propriety of securing the benefit of the *habeas corpus* in the most ample manner, moved, that it should not be suspended, but on the most urgent occasions, and then for a limited time, not exceeding twelve months.

"Mr RUTLEDGE was for declaring the *habeas corpus* inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the States.

"Mr GOUVERNEUR MORRIS moved" (5 *Ib.*, 484) to "add the following amendment to the 4th section, 11th article;

"The privilege of the writ of *habeas corpus* shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it" (1 *Ib.*, 270.)

"Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail.

"The first part of Mr. Gouverneur Morris's motion, to the word 'unless,' was agreed to *nem. con.* On the

remaining part, New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, ay, 7; North Carolina, South Carolina, Georgia, no, 3." (5 *Ib.*, 484.)

"SATURDAY, *Sept.* 8, 1787.—A committee was then appointed by ballot to revise the style of, and arrange, the articles which had been agreed to by the House. The committee consisted of Mr. Johnson, Mr. Hamilton, Mr. Gouverneur Morris, Mr. Madison, and Mr. King." (5 *Ib.*, 530; 1 *Ib.*, 295.)

"*Revised Draft of the Constitution, reported September* 12, 1787, *by the Committee of Revision:*

"ART. I, Sect. 9, (Clause 2.)—The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." (1 *Ib.*, 298, 301.)

"ART. III, Sect. 2. (Clause 3.)—The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime[s] shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." (1 *Ib.*, 304.)

"THURSDAY, *Sept.* 13, 1789.— * * It was moved and seconded to proceed to the comparing of the report from the committee of revision with the articles which were agreed to by the House, and to them referred for arrangement; which passed in the affirmative. * * * And the same was read by paragraphs, compared, and in some places corrected and amended." (1 *Ib.*, 307.)

[The extracts last cited reappear unaltered, in word or position, in the Constitution submitted to the States, except the word "crime," which was changed to "crimes," but on whose motion it does not appear. (5 *Ib.*, 535 to 553.)]

VII.

EXTRACTS FROM THE DEBATES IN THE STATE CONVENTIONS, RELATIVE TO THE HABEAS CORPUS.

MASSACHUSETTS.

January 26th, 1788. "The paragraph which provides

that 'the privilege of the writ of *habeas corpus* shall not be suspended, unless in cases of rebellion or invasion,' was read, when

"Gen. THOMPSON asked the President to please to proceed. We have, said he, read the book often enough; it is a consistent piece of inconsistency.

"Hon. Mr. ADAMS, in answer to an inquiry of the Hon. Mr. Taylor, said that this power given to the general government to suspend this privilege in cases of rebellion and invasion, did not take away the power of the several states to suspend it, if they shall see fit.

"Dr. TAYLOR asked, why this darling privilege was not expressed in the same manner it was in the Constitution of Massachusetts. (Here the honorable gentleman read the paragraph respecting it, in the Constitution of that State, and then the one in the proposed Constitution.) He then remarked on the difference of expression, and asked why the time was not limited.

"Judge DANA said, the answer, in part, to the honorable gentleman, must be, that the same men did not make both Constitutions; that he did not see the necessity or great benefit of limiting the *time*. Supposing it had been as in our Constitution, 'not exceeding twelve months,' yet as our Legislature can, so might the Congress, continue the suspension of the writ from time to time, or from year to year. The safest and best restriction, therefore, arises from the nature of the cases in which Congress are authorized to exercise that power at all, namely, in those of rebellion or invasion. These are clear and certain terms, facts of public notoriety, and whenever these cases shall cease to exist, the suspension of the writ must necessarily cease also. He thought the citizen had a better security for his privilege of the writ of *habeas corpus* under the Federal than under the State Constitution; for our Legislature may suspend the writ as often as they judge 'the most urgent and pressing occasions call for it.' He hoped these short observations would satisfy the honorable gentleman's inquiries; otherwise, he should be happy to do it by going more at large into the subject.

"Judge SUMNER said, that this was a restriction on Congress, that the writ of *habeas corpus* should not be suspended, except in cases of rebellion or invasion. The learned judge then explained the nature of this writ. * * * * This privilege, he said, is essential to freedom, and therefore the power to suspend it is restricted. On the other hand, the State, he said, might be involved in danger; the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country, with-

out the power to suspend the writ was thus given. Congress have only power to suspend the privilege to persons committed by their authority. A person committed under the authority of the States will still have a right to this writ." (2 *Ell. Deb.*, 108, 109.)

February 1, 1788. "Mr. MASON. * * * The paragraph that gives Congress power to suspend the writ of *habeas corpus* claims a little attention. This is a great bulwark, a great privilege indeed. We ought not, therefore, to give it up on any slight pretence. Let us see: How long is it to be suspended? As long as rebellion or invasion shall continue. This is exceeding loose. Why is not the time limited as is [in] our Constitution? But, sir, 'its design would then be defeated.' It was the intent; and by it we shall give up one of our greatest privileges.". (2 *Ib.*, 137.)

NEW YORK: "The committee then proceeded through sections 8, 9 and 10 of this article [Art. I.] with little or no debate. As the Secretary read the paragraphs, amendments were made in the order and form hereinafter recited (2 *Ell. Deb.*, 406): * * *

"Sec. 9.—Respecting the privilege of *habeas corpus*:

"'*Provided*, That whenever the privilege of *habeas corpus* shall be suspended, such suspension shall in no case exceed the term of six months, or until the next meeting of Congress.' Moved by Mr. LANSING." (2 *Ib.*, 407.)

The ratification convention of the State of New York "declared and made known" among other things * * * "That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*" (1 *Ell. Deb.*, 328); and that "Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, we * * * ratify the said Constitution." (1 *Ib.*, 329.)

The convention "enjoin it upon their representatives in Congress, to exert all their influence and use all reasonable means, to obtain a ratification of the following amendments to the said Constitution (*Ib.*): * * *

"That the privilege of the *habeas corpus* shall not, by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following the passing the act for such suspension." (*Ib.*, 330.)

VIRGINIA.

"Mr. WILSON NICHOLAS. * * But it is complained that they may suspend our laws. The suspension of the writ of *habeas corpus* is only to take place in cases of rebellion or invasion. This is necessary in those cases; in every other case Congress is restrained from suspending it. In no other case can they suspend our laws; and this is a most estimable security." (3 *Ell. Deb.*, 102.)

"Mr. GRAYSON thought it questionable whether rights not given up were reserved. * * He further remarked that there were some negative clauses in the Constitution which refuted the doctrine contended for by the other side. For instance: the 2d clause of the 9th Section of the 1st article provided that 'the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.' And, by the last clause of the same section, 'no title of nobility shall be granted by the United States.' Now, if these restrictions had not been here inserted, he asked whether Congress would not most clearly have had a right to suspend that great and valuable right, and to grant titles of nobility? When, in addition to these considerations, he saw they had an indefinite power to provide for the general welfare, he thought there were great reasons to apprehend great dangers. He thought, therefore, that there ought to be a bill of rights." (3 *Ib.*, 449.)

"Mr. HENRY. * * What will be the result if Congress, in the course of their legislation, should do a thing not restrained by this 9th Section? It will fall as an incidental power to Congress, not being prohibited expressly in the Constitution. The first prohibition is, that the privilege of the writ of *habeas corpus* shall not be suspended, but when, in case of rebellion or invasion, the public safety may require it. It results clearly that, if it had not said so, they could suspend it in all cases whatever." (3 *Ib.*, 461.)

"Mr RANDOLPH. * * But the insertion of the negative restrictions has given cause of triumph, it seems, to gentlemen. They suppose that it demonstrates that Congress are to have powers by implication. I will

meet them on that ground. I persuade myself that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested. * * He asks, Where is the power to which the prohibition of suspending the *habeas corpus* is an exception? I contend that, by virtue of the power given to Congress to regulate courts, they could suspend the writ of *habeas corpus*. This is therefore an exception to that power." * * * (3 *Ell. Deb.*, 464.)

VIII.

INSTANCES IN WHICH THE PRIVILEGE HAS BEEN SUSTAINED, AND HOW UNDERSTOOD.

Marshall, C. J., Ex p. Bollman, 4 *Cranch*, 101.

"If at any time the public safety should require the suspension of the powers vested by this Act in the Courts of the United States, it is for the Legislature to say so. The question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, the Court can only see its duty and obey the laws."

Taney, C. J., Ex p. John Merriman, 9 *Am. Law Reg.* (1861), 536.

"I can add nothing to these clear and emphatic words of my great predecessor."

1 *Tucker's Blackstone, App.*, 292.

"In the United States it (the writ of *habeas corpus*) can be suspended only by authority of Congress; but not whenever Congress may think proper; for it cannot be suspended, unless in cases of actual rebellion or invasion."

Story Const., Sec. 1342, *and notes* 2 *and* 3.

"It would seem, as the power is given to Congress to suspend the writ of *habeas corpus*, that the right to judge whether the exigency had arisen must belong exclusively to that body. *Martin* v. *Mott*, 3 *Wheat.*, 19. See also 1 *Tucker's Comm., App.*, 292; 1 *Kent's Comm., Lect.* 12, 2*d ed., pp.* 262–5." * * * "The only attempt ever made in Congress to suspend the writ of *habeas corpus* was during his (Jefferson's) administration, on occasion of the supposed treasonable conspiracy of Col. Aaron Burr."

Rawle on the Constitution, 114.

"Of this the Constitution probably intends that the Legislature of the United States shall be the judges, charged as they are with the preservation of the United States from both these evils, and it seems not unreasonable that this control over the writ of *habeas corpus* should rest with them."

Smith's Comm., 364.

"* * * The restrictions laid upon the legislative power of this Union, under express prohibitions found in the same instrument; and among them is that which forbids the *habeas corpus* to be suspended."

Sedgwick's Stat. and Const. Law, 598.

"It is understood that, as the unlimited power, in cases of rebellion and invasion, is vested in Congress, the right to judge of the expediency of the exercise is also vested absolutely in that body."

IX.

History of the Third, Fifth and Sixth Amendments to the Constitution.

In the State Conventions.

Massachusetts.

[The Constitution was first discussed by paragraphs. In the course of this debate the following remarks were made:]

"*January* 30, 1787.—Mr. Holmes: Mr. President, [John Hancock,] I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.

"It is a maxim universally admitted that the safety of a subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed, where a jury of his peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime,

and also to judge of the *credibility* of the witnesses. There a person must be tried by a jury of strangers; a jury who *may* be interested in his conviction; and where he *may*, by reason of the distance of his residence from the place of trial, be incapable of making such a defence, as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed.

"These circumstances, as horrid as they are, are rendered still more dark and gloomy, as there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which, the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court which has jurisdiction of the crime with which he is charged, (and how frequent those sessions are to be we are not yet informed of,) and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings.

"And what makes the matter still more alarming is, that the mode of criminal process is to be pointed out by Congress, and they have no constitutional check on them, except that the trial is by a *jury;* but who this jury is to be, how qualified, where to live, how appointed, or by what rules to regulate their procedure, we are ignorant of as yet: whether they are to live in the county where the trial is; whether they are to be chosen by certain districts, or whether they are to be appointed by the sheriff, *ex-officio;* whether they are to be for one session of the court only, or for a certain term of time, or for good behavior, or during pleasure, are matters which we are entirely ignorant of as yet.

"The mode of trial is altogether undetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.

"These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges, neither is it made certain in the Constitution that a

person charged with the crime shall have the privilege of appearing before the Court or jury which is to try him.

"On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution the *Inquisition*. * * * *

"There is nothing to prevent Congress from passing laws which shall compel a man who is accused or suspected of a crime to furnish evidence against himself, and even from establishing laws which shall order the Court to take the charge exhibited against a man for truth, unless he can furnish evidence of his innocence.

"I do not pretend to say Congress *will* do this; but, sir, I undertake to say that Congress (according to the powers proposed to be given them by the Constitution) *may* do it; and if they do not, it will be owing *entirely*—I repeat it, it will be owing *entirely*—to the goodness of the men, and not in the *least degree* to the goodness of the Constitution.

"The framers of our State Constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed so unsafe to intrust our State Legislature with, I am unable to conceive." (2 *Ell. Deb.*, 109 *to* 112.)

"Mr. GORE observed, in reply to Mr. Holmes, that * * * very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum*. In criminal cases alone are they interested to have the trial under their own control; and, in such cases, the Constitution expressly stipulates for trial by jury; but then, says the gentleman from Rochester, (Mr. Holmes,) to the safety of life it is indispensably necessary the trial of crimes should be in the vicinity; and the vicinity is construed to mean county; this is very incorrect, and gentlemen will see the impropriety, by referring themselves to the different local divisions and districts of the several States. But further, said the gentleman, the idea that the jury, coming from the neighborhood and knowing the character and circumstances of the party, is promotive of justice, on reflection will appear not founded in truth. If the jury judge from any other circumstances but what are part of the cause in

question, they are not impartial. The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in [on] trial, a just decision would be more probable. From such motives did the wise Athenians so constitute the famed Areopagus, that, when in judgment, this Court should sit at midnight, and in total darkness, that the decision might be on the thing, and not on the person. Further, said the gentleman, it has been said, because the Constitution does not expressly provide for an indictment by grand jury in criminal cases, therefore some officer under this government will be authorized to file informations, and bring any man to jeopardy of his life, and indictment by grand jury will be disused. If gentlemen who pretend such fears, will look into the Constitution of Massachusetts, they will see that no provision is therein made for an indictment by grand jury, or to oppose the danger of an attorney-general filing informations; yet no difficulty or danger has arisen to the people of this Commonwealth from this defect, if gentlemen please to call it so. If gentlemen would be candid, and not consider that, wherever Congress may possibly abuse power they certainly will, there would no difficulty in the minds of any in adopting the proposed constitution." (2 *Ib.*, 112, 113.)

[The discussion of the separate paragraphs being ended, Mr. Hancock submitted several propositions to the Convention, the text of which is not given. (2 *Ib.*, 123.) On the sixth proposition, the following remarks were made:]

"*February* 1, 1788—Mr. ADAMS: * * * Your Excellency's next proposition is, to introduce the indictment of a grand jury before any person shall be tried for any crime by which he may incur infamous punishment or loss of life; and it is followed by another, which recommends a trial by jury in civil actions between citizens of different States, if either of the parties shall request it. These, and several others which I have mentioned, are so evidently beneficial as to need no comment of mine. And they are all, in every particular, of so general a nature, and so equally interesting to every State, that I cannot but persuade myself to think they would all readily join with us in the measure proposed by your Excellency, if we should now adopt it." (2 *Ib.*, 132, 133.)

[Mr. Hancock's propositions were referred to "a committee, who reported some amendments" (*Ib.*, 148), apparently in the form finally adopted. (*Ib.*)]

"VI. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." (2 *Ell. Deb.*, 177.)

NEW HAMPSHIRE.

VI. (Same as Massachusetts, *supra*, 1 *Ib.*, 326.)

"X. That no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress; nor shall soldiers, in time of peace, be quartered upon private houses, without the consent of the owners."

NEW YORK.

"*July* 2, 1788.—Mr. TREADWELL. * * * It appears to me that, in forming this Constitution, we have run into the same error which the lawyers and pharisees of old were charged with; that is, while we have secured the tithes of mint, anise and cumin, we have neglected the weightier matters of the law—judgment, mercy, and faith. Have we not neglected to secure to ourselves the weighty matters of judgment or justice, by empowering the general government to establish one supreme, and as many inferior Courts as they please, whose proceedings they have a right to fix and regulate as they shall think fit, so that we are ignorant whether they shall be according to the common, civil, the Jewish, or Turkish law? What better provisions have we made for mercy, when a man, for ignorantly passing a counterfeit continental note, or bill of credit, is liable to be dragged to a distant county, two or three hundred miles from home, deprived of the support and assistance of friends, to be tried by a strange jury, ignorant of his character, ignorant of the character of the witnesses, unable to contradict any false testimony brought against him, by their own knowledge of facts, and with whom the prisoner, being unacquainted, he must be deprived totally of the benefit of his challenge? And besides all that, he may be exposed to lose his life, merely for want of property to carry his witnesses to such a distance; and after all this solemn farce and mockery of a trial by jury, if they should acquit him, it will require more ingenuity than I am master of, to show that he does not hold his life at the will and pleasure of the Supreme Court, to which an appeal lies, and consequently depend on the tender mercies, perhaps, of the

wicked (for judges may be wicked); and what those tender mercies are, I need not tell you. You may read them in the history of the Star Chamber Court of England, and in the Courts of Philip, and in your Bible." (2 *Ell. Deb.*, 399, 400.)

NEW YORK.

The Convention "declared and made known: * * *

"That the militia should not be subject to martial law, except in time of war, rebellion, or insurrection.

"That standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power.

"That, in time of peace, no soldier ought to be quartered in any house, without the consent of the owner; and, in time of war, only by the civil magistrate, in such manner as the laws may direct.

"That no person ought to be taken, imprisoned, or disseized of his freehold, or be exiled, or deprived of his privileges, franchises, life, liberty, or property, but by due process of law.

"That no person ought to be twice put in jeopardy of life or limb, for one and the same offence; nor, unless in case of impeachment, be punished more than once for the same offence.

* * *

"That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes, cognizable by the judiciary of the United States; and such trial should be speedy, public, and by an impartial jury of the county where the crime was committed; and that no person can be found guilty without the unanimous consent of such jury. But in cases of crimes not committed within any county of any of the United States, and in cases of crimes committed within any county in which a general insurrection may prevail, or, which may be in possession of a foreign enemy, the inquiry and trial may be in such county as the Congress shall by law direct; which county, in the two cases last mentioned, should be as near as conveniently may be to that county in which the crime may have been committed; and that, in all criminal prosecutions the accused ought to be informed of the cause and nature of his accusation, to be confronted with his accusers and

the witnesses against him; to have the means of producing his witnesses; and the assistance of counsel for his defence; and should not be compelled to give evidence against himself.

"That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate." (*Ib.*, 328.)

MARYLAND:

* * * *April* 25, 1788.—A committee was appointed to report "a draft of such amendments and alterations as may be thought necessary." (Address to the people of Maryland, (2 *Ell. Deb.*, 549.) * * *

"The following amendments to the proposed Constitution were separately agreed to by the committee, most of them by an unanimous vote, and all of them by a great majority. (2 *Ib.*, 549, 550.) * * *

"'2. That there shall be a trial by jury in all criminal cases, according to the course of proceeding in the State where the offence is committed; and that there be no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land and naval forces.' (2 *Ib.*, 550.) * * *

"The great objects of these amendments were to secure the trial by jury in all cases, the boasted birthright of Englishmen and their descendants, and the palladium of civil liberty; and to prevent the appeal from fact, which not only destroys that trial in civil cases, but by construction, may elude it in criminal cases. (*Ib.*) * *

"'10. That soldiers be not quartered in time of peace upon private houses, without the consent of the owners.' (2 *Ib.*, 552.) * * *

"'13. That the militia shall not be subject to martial law, except in time of war, invasion or rebellion.'

"This provision to restrain the powers of Congress over the militia, although by no means so ample as that provided by Magna Carta, and the other great fundamental and constitutional laws of Great Britain, (it being contrary to Magna Carta to punish a freeman by martial law in time of peace, and murder to execute him,) yet it may prove an inestimable check; for all other provisions in favor of the rights of men would be vain and nugatory, if the power of subjecting all men able to bear arms, to martial law at any moment should remain vested in Congress.

"Thus far the amendments were agreed to." (2 *H.*, 552.)

VIRGINIA.

"Mr. RANDOLPH, * * * It is also objected that the trial by jury, the writ of *habeas corpus*, and the liberty of the press, are insecure. But I contend that the *habeas corpus* is at least on as secure and good a footing as it is in England. In that country, it depends on the will of the Legislature. That privilege is secured here by the Constitution, and it is only to be suspended in cases of extreme emergency. Is not this a fair footing?" * * (3 *Ell., Deb.*, 203.)

"Mr. MADISON. * * * The English Parliament never passes a mutiny bill but for one year. This is necessary, for otherwise the soldiers would be on the same footing with the officers, and the army would be dissolved. One mutiny bill has been here in force since the revolution. I humbly conceive there is extreme danger of establishing cruel martial regulations. If at any time our rulers should have unjust and iniquitous designs against our liberties, and should wish to establish a standing army, the first attempt would be to render the service and use of the militia odious to the people themselves, subjecting them to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much as to make them cry out, 'Give us a standing army!' I would wish to have some check to exclude this danger; as, that the militia should never be subject to martial law but in time of war." (*Ib.*, 381.)

* * * "The Hon. member * * * wishes martial law to be exercised only in time of war, under an idea that Congress can establish it in time of peace. The states are to have the authority of training the militia according to the congressional discipline; and of governing them at all times when not in the service of the Union. Congress is to govern such part of them as may be employed in the actual service of the United States, and such part only can be subject to martial law." (*Ib.*, 383.)

"Mr. MASON. * * The gentleman has said that they would be only subject to martial law when in actual service. He demanded what was to hinder Congress from inflicting it always, and making a general law for the purpose. If so, said he, it must finally produce, most infallibly, the annihilation of the state governments. These were his apprehensions; but he prayed God they might be groundless.

"Mr. Madison replied, that the obvious explanation was, that the states were to appoint the officers, and govern all the militia, except that part which was called into the actual service of the United States." (*Ib.*, 416.)

"Mr HENRY. * * * That paper tells you that the trial of crimes shall be by jury, and held in the State where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty; a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men?" (*Ib.*, 447.)

"Mr GRAYSON. * * * The allusion another gentleman has made to this trial, as practiced in England, is improper. It does not justify this regulation. The jury may come from any part of the state. They possess an absolute, uncontrollable power over the *venue*. The conclusion, then is, that they can hang any one they please, by having a jury to suit their purpose. They might on particular, extraordinary occasions, suspend the privilege. The Romans did it on creating a dictator. The British Government does it when the *habeas corpus* is to be suspended; when the *salus populi* is affected. I will never consent to it unless it be properly defined." (*Ib.*, 569.)

"Mr. RANDOLPH.—I beg leave to differ from my honorable friends in answering this objection. They said, that in case of a general rebellion, the jury was to be drawn from some other part of the country. I know this practice is sanctified by the usages in England. But I always thought that this was one of those instances to which that country, though alive to liberty, had unguardedly submitted. I hope it will never be so here. If the whole country be in arms, the prosecutor for the commonwealth can get a good jury by challenging improper jurors. The right of challenging, also, is sufficient security for the person accused. I can see no instance where this will be abused. It will answer every purpose of the government, and individual security." (*Ib.*, 574.)

DECLARATION OF RIGHTS.

"8th. That, in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and wit-

nesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces); nor can be compelled to give evidence against himself.

"10th. That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful; and that such remedy ought not to be denied or delayed.

"18th. That no soldier in time of peace ought to be quartered in any house, without the consent of the owner; and, in time of war, in such manner only as the law directs." (*Ib.*, 658, 659.)

Amendments to the Constitution.

"11th. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties and punishments as shall be directed or inflicted by the laws of its own State.

"15th. That in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury." (*Ib.*, 660, 661.)

Debates in Congress.

[The amendments were considered in the House, as follows: The proposed amendments were referred to a Committee of Eleven (July 21), reported upon (July 28), referred to the Committee of the Whole on the state of the Union (1 *Gale*, 793), and then reported to the House (*Ib.*, 765), debated there (*Ib.*, 765 to 777), referred to a Committee to arrange and report (*Ib.*, 778), which report was agreed to, August 24, 1789 (*Ib.*, 779), and engrossed and sent to the Senate (*Ib. and* 71); there considered (*Ib.*, 74, 76), amendments proposed (*Ib.*, 83), which were amended by the House (*Ib.*, 903, 905); finally agreed to by the Senate (*Ib.*, 88).]

Mr. Madison made the following propositions of amendment:

"[4, *Clause* 5.]—No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor at any time, but in a manner warranted by law.

"[4, *Clause* 6.]—No person shall be subject except in cases of impeachment to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property without due process of law, nor be obliged to relinquish his property when it may be necessary for public use, without a just compensation.

"[4, *Clause* 8.]—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; to be informed of the cause and nature of the accusation; to be confronted with his accusers and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

"[7, *Clause* 1.]—The trial of all crimes (except in cases of impeachment and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an indispensable preliminary; provided, that in cases of crimes committed within any county which may be in possession of the enemy, or in which a general insurrection may prevail the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.

"[7, *Clause* 2.]—In cases of crimes not committed within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." (1 *Gale Hist. of Cong.*, 1834, *pp.* 434, 435.)

[These propositions were referred to a committee of eleven, who reported thereon as follows:]

[4th, *Clause* 4.]—"No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time but in a manner to be prescribed by law."

[4th, *Clause* 5.]—"No person shall be subject except in case of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property without due process of law, nor be obliged to relinquish his property when it may be necessary for public use without a just compensation."

[7th, *Clause* 1.]—"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; to be informed of the cause and nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

[7th, *Clause* 2.]—"The trial of all crimes (except in cases of impeachment and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury; but if a crime be committed in any place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; (*) and if it be committed in a place not within a State, the indictment and trial may by law be at such place or places as the law may have directed."

[7th, *Clause* 3.]—"In suits at common law the right of trial by jury shall be preserved." (*N. Y. Journal and Weekly Reg., Vol.* 43, *No.* 36, *July* 30, 1789.)

[The Committee of the Whole to whom this report was referred, made some alterations, which appear in the following:]

HOUSE BILL.

"*Monday, 24th August*, 1789.

ART. 6. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ART. 8. No person shall be subject, except in case of impeachment, to more than one trial, or one punishment, for the same offence; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ART. 9. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ART. 10. [Same as in the Report of the Committee of the Whole 7th, clause 2, *supra*, to the * (*Ib., v.* 43, *no.* 40.)]

[This bill was sent to the Senate, which returned the following to the House:]

SENATE BILL.

"ART. 5. [Same as House Bill, ART. 6.]

"ART. 7. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"ART. 8. [Same as House Bill, ART. 9." (*Ib.*, *v.* 43, *no.* 43.)]

Sept. 21. "The amendments of the Senate to the amendments proposed by the House to the Constitution were then taken up; some were agreed to, and others non-concurred. Messrs. Madison, Sherman and Vining were appointed a Committee to confer with a Committee of the Senate on those amendments in which the two houses do not agree." (*N. Y. Journal and Weekly Reg.*, *v.* 43, *no.* 44, *p.* 22.)

Sept. 24. "The Report of the Committee of Conference on the subject of Amendments to the Constitution was taken up. The committee advise to a concurrence in the amendments of the Senate with some amendments." (*Ib.*, *no.* 45, *p.* 2.) [one of which was:]

"ART. 8. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." (1 *Gale*, 915.)

X.

ACTS OF CONGRESS, RELATING TO MILITARY COMMISSIONS AND COURTS MARTIAL.

Act of July 22, 1861. (12 *U. S. Stat.*, 270.)

§ 10. "And be it further enacted, that the general commanding a separate department, or a detached army, is

hereby authorised to appoint *a military board or commission*, of not less than three, or more than five officers, whose duty it shall be to examine the capacity, qualifications, propriety of conduct, and efficiency of any commissioned officer of volunteers, &c. Provided always that no officer shall be eligible to sit on *such board or commission*, whose rank or promotion would in any way be affected by its proceedings, &c."

Act of July 17, 1862. (12 *U. S. Stat.*, 598.)

§ 5. "The President shall appoint, by, and with the advice and consent of the Senate, a judge-advocate general, with the rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned for revision, the records and proceedings of all courts martial and *military commissions*, and where a record shall be kept of all proceedings had thereupon; and no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President."

Act of March 3, 1863. (12 *U. S. Stat.*, 736.)

§ 30. "In time of war, insurrection or rebellion, murder &c., shall be punishable by the sentence of a general court martial or *military commission*, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishment for such offences shall never be less than those inflicted by the laws of the State, territory or district, in which they may have been committed."

Act of March 3, 1863. (12 *U. S. Stat.*, 737.)

§ 37. "All persons, who in time of war or rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court martial or *military commission*, and shall upon conviction suffer death."

Act of July 2, 1864. (13 *U. S. Stat.*, 356.)

"The provisions of" (1863, ch. 75, § 21), "shall apply as well to the sentences of *military commissions* as to those of courts martial; and hereafter the commanding general in the field, or the commander of a department,

shall have power to carry into execution all sentences against guerilla marauders," &c.

Act of Feb. 13, 1862. (13 *U. S. Stat.*, 339, 340.)

§ 4. "The 2d section of the Act of the 10th of April, 1806 *[2 U. S. Stat., p. 371], is hereby amended so as to read as follows:

"In time of war or rebellion against the supreme authority of the United States, all persons who shall be found lurking as spies, or acting as such in or about the fortifications, encampments, posts, quarters, or headquarters of the armies of the United States, or any of them within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court martial."

Act of March 3, 1863, *ch.* 75, § 21. (12 *U. S. Stat.*, 735.)

§ 21. "So much of § 5" (of laws of 1862, ch. 201, 12 U. S. Stat., p. 598,) "as requires the approval of the President to carry into execution the sentence of a court martial, be, and the same is hereby repealed as far as relates to carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offences may be carried into execution upon the approval of the commanding general in the field."

Articles of War. (2 *U. S. Stat.*, 367.)

"ART. 64.—General courts martial may consist of any number of commissioned officers, from 5 to 13 inclusively, but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service.

"ART. 65.—Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts martial whenever necessary."

4 *U. S. Stat.*, 417.

ART. 65, amended: "Whenever a general command-

* Which declared that "In time of war all persons not citizens of or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death according to the law and usage of nations by sentence of a general court martial."

ing an army, or a colonel commanding a separate department, shall be the accuser or prosecutor of any officer in the army of the United States under his command, the general court martial for the trial of such officer shall be appointed by the President of the United States."

XI.

PROCLAMATIONS AND ORDERS OF THE PRESIDENT RELATING TO HABEAS CORPUS, &c.

Proclamation of Sept. 24, 1862. (*Lawrence's Wheaton on International Law*, p. 522. *Judge Advocate Bingham's Argument in* Booth's *case*, p. 22.)

"By the President of the United States of America:

"A PROCLAMATION.

"Whereas it has become necessary to call into service not only volunteers, but also portions of the militia of the United States, by a draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary process of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection:

"Now, therefore, be it ordered, that during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts martial or military commission.

"2d.—That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission.

"In witness whereof I have hereunto set my hand and caused the Seal of the United States to be affixed.

"Done at the City of Washington, this 24th September, A. D. 1862, and of the Independence of the United States the eighty-seventh.

"ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD,

"*Secretary of State.*"

Proclamation of May 10, 1861. (12 *U. S. Stat., App. No.* 7, p. iv.)

"By the President of the Uniied States of America:

"A PROCLAMATION.

"Whereas an insurrection exists in the State of Florida, by which the lives, liberty, and property of loyal citizens of the United States are endangered;

"And whereas it is deemed proper that all needful measures should be taken for the protection of such citizens and all officers of the United States in the discharge of their public duties in the State aforesaid:

"Now, therefore, be it known that I, ABRAHAM LINCOLN, President of the United States, do hereby direct the commander of the forces of the United States on the Florida coast, to permit no person to exercise any office or authority upon the islands of Key West, the Tortugas, and Santa Rosa, which may be inconsistent with the Laws and Constitution of the United States, authorizing him at the same time, if he shall find it necessary, to suspend there the writ of *habeas corpus*, and to remove from the vicinity of the United States fortresses all dangerous or suspected persons.

"In witness whereof, I have hereunto set my hand, and caused the Seal of the United States to be affixed.

"Done at the City of Washington, this tenth day of May, in the year of our Lord 1861, and of the Independence of the United States the eighty-fifth.

[L. S.]

"ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD,

"*Secretary of State.*"

Proclamation of Sept. 15, 1863. (13 *U. S. Stat., App. No.* 5 p. iv.)

"By the President of the United States of America:

"A PROCLAMATION.

"Whereas, the Constitution of the United States has ordained that the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it; and whereas, a rebellion was existing on the third day of March, 1863, which rebellion is still existing; and whereas, by a statute which was approved on that day, [12 U. S. Stat., 755,] it was enacted by the Senate and House of Representatives of the United States, in Congress assembled, that

during the present insurrection, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof; and whereas, in the judgment of the President, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States, in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules and regulations prescribed for the military or naval forces, by authority of the President of the United States, or for resisting a draft, or for any other offence against the military or naval service:

"Now, therefore, I, ABRAHAM LINCOLN, President of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of *habeas corpus* is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the present rebellion, or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked. And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval services of the United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly, and in conformity with the Constitution of the United States and the laws of Congress in such case made and provided.

"In testimony whereof, I have hereunto set my hand, and caused the seal of the United States to be [L. S.] affixed, this fifteenth day of September, in the year of our Lord 1863, and of the Independence of the United States of America the eighty-eighth.

"ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD,

"*Secretary of State.*"

Proclamation of July 5, 1864. (13 *U. S. Stat., App. No.* 15, p. xii.)

"By the President of the United States of America:

"A PROCLAMATION.

"Whereas, by a proclamation which was issued on the 15th day of April, 1861, the President of the United States announced and declared that the laws of the United States had been for some time past, and then were, opposed, and the execution thereof obstructed, in certain States, therein mentioned, by combinations too powerful to be suppressed by the ordinary course of judical proceedings or by the powers vested in the marshals by law;

"And whereas, immediately after the issuing of the said proclamation, the land and naval forces of the United States were put into activity to suppress the said insurrection and rebellion;

"And whereas the Congress of the United States, by an Act approved on the 3d day of March, 1863, did enact that during the said rebellion the President of the United States whenever in his judgment the public safety may require it, is authorized to suspend the privilege of *habeas corpus* in any case throughout the United States, or in any part thereof;

"And whereas the said insurrection and rebellion still continues, endangering the existence of the Constitution and Government of the United States;

"And whereas the military forces of the United States are now actively engaged in suppressing the said insurrection and rebellion, in various parts of the States where the said rebellion has been successful in obstructing the laws and public authorities, especially in the States of Virginia and Georgia;

"And whereas, on the fifteenth day of September last, the President of the United States duly issued his proclamation, wherein he declared that the privilege of the writ of *habeas corpus* should be suspended throughout the United States, in cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted, or mustered, or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the

President of the United States, or for resisting a draft, or for any other offence against the military or naval service;

"And whereas many citizens of the State of Kentucky have joined the forces of the insurgents, and such insurgents have, on several occasions, entered the said State of Kentucky in large force, and, not without aid and comfort, furnished by disaffected and disloyal citizens of the United States, residing therein, have not only greatly disturbed the public peace, but have overborne the civil authorities and made flagrant civil war, destroying property and life in various parts of that State;

"And whereas it has been made known to the President of the United States, by the officers commanding the national armies, that combinations have been formed in the said State of Kentucky, with a purpose of inciting rebel forces to renew the said operations of civil war within the said State, and thereby to embarrass the United States armies now operating in the said States of Virginia and Georgia, and even to endanger their safety:

"Now, therefore, I, ABRAHAM LINCOLN, President of the United States, by virtue of the authority vested in me by the Constitution and laws, do hereby declare that, in my judgment, the public safety especially requires that the suspension of the privilege of the writ of *habeas corpus*, so proclaimed in the said proclamation of the fifteenth of September, 1863, be made effectual and be duly enforced in and throughout the said State of Kentucky, and that martial law be for the present established therein. I do, therefore, hereby require of the military officers in the said State, that the privilege of the writ of *habeas corpus* be effectually suspended within the said State, according to the aforesaid proclamation, and that martial law be established therein, to take effect from the date of this proclamation, the said suspension and establishment of martial law to continue until this proclamation shall be revoked or modified, but not beyond the period when the said rebellion shall have been suppressed, or come to an end. And I do hereby require and command, as well all military officers, as all civil officers, existing or found within the said State of Kentucky, to take notice of this proclamation, and to give full effect to the same.

"The martial law herein proclaimed, and the things in that respect herein ordered, will not be deemed or taken to interfere with the holding of lawful elections, or with the proceedings of the Constitutional Legislature of

Kentucky, or with the administration of justice in the courts of law existing therein, between citizens of the United States, in suits or proceedings which do not affect the military operations or the constituted authorities of the Government of the United States.

"In testimony whereof, I have hereunto set my hand, [L. S.] and caused the seal of the United States to be affixed.

"Done at the City of Washington, this fifth day of July, in the year of our Lord, 1864, and of the Independence of the United States the eighty-ninth.

"ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD,

"*Secretary of State.*"

XII.

JOHNSON *cs.* DUNCAN, ET AL'S SYNDICS; 3 MARTIN'S LA. REP., 520.

MARTIN, J. A motion that the Court might proceed in this case, has been resisted on two grounds:

1. THAT the city and its environs were, by general orders of the officer, commanding the military district, put, on the 15th of December last, *under strict martial law.*

2. THAT, by the Third Section of an Act of Assembly, approved on the 18th day of December last, all proceedings in any civil case are suspended.

1. AT the close of the argument, on Monday last, we thought it our duty, lest the smallest delay should countenance the idea that this Court entertain any doubt, on the first ground, instantly to declare, *viva voce* (although the practice is to deliver our opinions in writing), that the exercise of an authority, vested by the law in this Court, could not be suspended by any man.

In any other State but this, in the population of which are many individuals, who, not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the judges of this Court should, in complying with the constitutional injunction *in all cases to adduce the reasons on which their judgment is founded*, take up much time to show that this Court is bound utterly to disregard what is thus called *Martial Law*; if anything

be meant, thereby, but the strict enforcing of the rules and articles for the government of the army of the United States, established by Congress, or any act of that body, relating to military matters, on all individuals belonging to the army or militia in the service of the United States. Yet, we are told that, by this proclamation of martial law, the officer who issued it has conferred on himself, over all his fellow-citizens, within the space which he has described, a supreme and unlimited power, which, being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them.

THIS bold and novel assertion is said to be supported by the Ninth Section of the First Article of the Constitution of the United States, in which are described the limitations of the power of the Legislature of the Union. It is there provided, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of invasion or rebellion, the public safety may require it." We are told that the commander of the military district is the person who is to suspend the writ, and is to do so whenever, *in his judgment*, the public safety appears to require it; that, as he may thus paralyze the arm of the justice of his country, in the most important case—the protection of the personal liberty of the citizen—it follows, that, as he who can do the *more* can do the *less*, he can also suspend all other functions of the civil magistrate; which he does, by his proclamation of martial law.

THIS mode of reasoning varies, *toto cælo*, from the decision of the Supreme Court of the United States, in the case of *Swartout* and *Bollman*, arrested in this city, in 1806, by General Wilkinson. The Court there declared, that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of *habeas corpus*, and that body was the sole judge of the necessity that called for the suspension. "If, at any time," said the Chief Justice, "the public safety shall require the suspension of the powers vested in the Courts of the United States by this Act (*the Habeas Corpus Act*), *it is for the Legislature to say so*. This question depends on political considerations, on which the Legislature is to decide. Till the legislative will be expressed, this Court can only see its duties, and must obey the law. (4 *Cranch*, 101.)

The high authority of this decision seems however to be disregarded; and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this State; it is therefore meet to dispel the clouds which designing men endeavor to cast on this

article of the Constitution, that the people should know that their rights, thus defined, are neither doubtful or insecure, but supported on the clearest principles of our laws.

APPROACHING, therefore, the question, as if I were without the above conclusive authority, I find it provided by the Constitution of this State that "no power of suspending the laws of this State shall be exercised, unless by the Legislature, or under its authority." The proclamation of martial law, therefore, if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature, I therefore cannot hesitate in saying that it is in this respect null and void. If, however, there be aught in the Constitution or laws of the United States that really authorizes the commanding officer of a military district to suspend the laws of this State, as that Constitution and these laws are paramount to those of the State they must regulate the decision of this Court.

THIS leads me to the examination of the power of suspending the writ of *habeas corpus*, and that which it is said to include, of proclaiming martial law, as noticed in the Constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of government but the Legislature, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto id de quo cogitatum non est.* If, therefore, this suspending power exist in the executive (under whose authority it has been endeavored to exercise it) it exists without any limitation, then the President possesses without a limitation a power which the Legislature cannot exercise without a limitation. Thus he possesses a greater power *alone* than the House of Representatives, the Senate and himself *jointly*.

AGAIN: The power of repealing a law and that of suspending it (which is a partial repeal) are legislative powers. For *eodem modo, quo quid constituitur, eodem modo destruitur.* As every legislative power that may be exercised under the Constitution of the United States, is exclusively vested in Congress, all others are retained by the people of the several States.

In England, at the time of the invasion of the pretender, assisted by the forces of hostile nations the *habeas corpus* act was suspended, but the executive did not thus of itself stretch its own authority, the precaution was deliberated upon and taken by the representatives of the people. *Delolme* 409. And there the power is

safely lodged without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humours of other men which they will have gratified, when they shall have thus overthrown the columns of public liberty. *Id.* 275.

If it be said that the laws of war, being the laws of the United States, authorize the proclamation of Martial Law, I answer that in peace or in war, no law can be enacted but by the Legislative power. In England, from whence the American jurist derives his principles in this respect, "Martial Law cannot be used without the authority of parliament," 5 Comyns 329. The authority of the monarch himself is insufficient. In the case of *Grant* vs. *Sir C. Gould*, 2 *Hen. Bl.* 69, which was on a prohibition (applied for in the Court of Common Pleas) to the defendant as judge advocate of a Court Martial, to prevent the execution of the sentence of that military tribunal, the counsel, who resisted the motion, said it was not to be disputed that Martial Law can only be exercised in England, so far as it is authorized by the mutiny act and the articles of war, all of which are established by parliament, or its authority, and the court declared it totally inaccurate to state any other Martial Law, as having any place whatever within the realm of England. In that country, and in these States, by Martial Law is understood the jurisprudence of these cases which are decided by military judges or Courts Martial. When Martial Law is established, and prevails in any country, said Lord Loughborough, in the case cited, it is totally of a different nature from that which is inaccurately called Martial Law, (because the decisions are by a Court Martial) but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, *which was contrary to the Constitution*, and which has been for a century totally exploded. When Martial Law prevails, continues the judge, the authority under which it is exercised claims jurisdiction over all *military* persons in *all* circumstances; even their *debts* are subject to inquiry by military authority, every species of offence committed by any person *who appertains to the army*, is tried, not by a civil judicature, but by the judicature of the corps or regiment to which he belongs.

This is Martial Law, as defined by Hale and Blackstone, and which the court declared not to exist in England. Yet, it is confined to *military* persons. Here it is contended, and the court must admit, if we sustain the objection, that it extends to *all* persons, that it dissolves for a while the government of the State.

Yet, according to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers, who have abused their powers, though only in regard to their own soldiers, are liable to prosecution in a court of law, and compelled to make satisfaction. Even any flagrant abuse of authority by members of a Court Martial, when sitting to judge their own people, and determine in cases entirely of a military kind, makes them liable to the animadversion of the Civil Judge. *Delolme*, 447, *Jacobs Law Dict.*, *Verbo Court Martial*. How preposterous then, the idea that a military commander may, by his own authority, destroy the tribunal established by law as the asylum of those oppressed by military despotism.

* * * * "DERBIGNY, J. On the first question, that which concerns the effect which the publication of the martial law has produced, with respect to the civil authorities, we might well have omitted giving a written opinion, now that the return of peace has re-established the empire of the laws; but having declared, on the day on which the discussion of this subject took place, that the powers vested in us by law could not be suspended by any but legislative authority, it is proper that we should give some explanation of the reasons on which that declaration was founded.

"I will, therefore, examine how martial law ought to be understood among us, and how far it introduces an alteration in the ordinary course of government.

"To have a correct idea of martial law in a free country, examples must not be sought in the arbitrary conduct of absolute governments. The monarch who unites in his hands all the powers, may delegate to his generals an authority as unbounded as his own. But in a republic where the Constitution has fixed the extent and limits of every branch of government in time of war, as well as of peace, there can exist nothing vague, uncertain or arbitrary in the exercise of any authority.

"The Constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide that in times of public danger, the executive power shall reign to the exclusion of all others. It does not trust into the hands of a dictator the reins of the government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision; and had they done it, the States would have rejected a constitution stained with a clause so threatening to their liberties. In the mean time, conscious of the

necessity of removing all impediments to the exercise of the executive power, in cases of rebellion or invasion, they have permitted Congress to suspend the privilege of the writ of *habeas corpus* in those circumstances, if the public safety should require it. Thus far, and no farther, goes the Constitution. Congress has not hitherto thought it necessary to authorize that suspension.

"Should the case ever happen, it is to be supposed that it would be accompanied with such restrictions as would prevent any wanton abuse of power. 'In England,' (says the author of a justly celebrated work on the constitution of that country,) 'at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the *habeas corpus* act was indeed suspended; but the executive power did not thus of itself stretch its own authority; the precaution was deliberated upon, and taken by the representatives of the people; and the detaining of individuals, in consequence of the suspension of the act, was limited to a fixed time. Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals; the proceedings against them were to be carried on no otherwise than in a public place; they were to be tried by their peers, and to have all the usual legal means of defence allowed to them, such as calling of witnesses, peremptory challenge of jurors, etc.' And can it be asserted, that, while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, *the necessity of which is to be judged of by himself*, assume a supreme, overbearing, unbounded power? The idea is not only repugnant to the principles of any free government, but subversive of the very foundations of our own.

"Under the Constitution and laws of the United States, the President has a right to call, or cause to be called, into the service of the United States, even the whole militia of any part of the Union, in case of invasion. This power, exercised here by his delegate, has placed all the citizens subject to militia duty under military authority and military rule. *That*, I conceive to be the extent of the martial law, beyond which all is usurpation of power. In that state of things the course of judicial proceedings is certainly much shackled, but the judicial authority exists,

and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the writ of *habeas corpus*, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice generally should be stopped. For, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases.

"The proclamation of the martial law, therefore, cannot have any other effect than that of placing under military authority, all the citizens subject to militia service. It is in that sense alone that the vague expression of martial law ought to be understood among us. To give it any larger extent would be trampling upon the Constitution and laws of our country.

"But the counsel for the appellant, to support his assertion that, in the circumstances then existing, the Court could not administer justice, went further and said that the City of New Orleans had become a camp, since it had pleased the General of the Seventh Military District to declare it so, and that within the precincts of a camp there can exist no other authority than that of the commanding officer. If the premises were true, the consequence would certainly follow. But the abuse of words cannot change the situation of things. A camp is a space of ground occupied by an army for their temporary habitation, while they keep the field. That space has limits; it does not extend beyond the ground actually occupied by the army. The camp of the American army, during the invasion of our territory by the British, was placed at a distance of four miles below the city. During that time the city might be considered a besieged place, having an entrenched camp in front. But the transformation of the city itself into a camp by the mere declaration of the General, is no more to be conceived than would the transformation of a camp into a city by the same means.

"It is, therefore, our opinion, that the authority of courts of justice has not been suspended of right by the proclamation of the martial law, nor by the declaration of the General of the Seventh Military District, that the City of New Orleans was a camp; and we now repeat what we declared when the subject was discussed: 'That the powers vested in us by law can be suspended by none but the legislature.'"

XIII.

The Origin of the Suspension Act in the English Parliament.

March 1, 1688. "Mr. Hamden, one of his Majesty's most honorable Privy Council, acquainted the House that he had a message from his Majesty: 'That his Majesty hath had credible information, that there are several persons in and about this town that keep private meetings and cabals, to conspire against the government, and for the assistance of the late King James; that his Majesty has caused some of those persons to be already apprehended and secured, upon suspicion of high treason, and that he thinks he may see cause to do so by others, within a little time; but his Majesty is between two great difficulties in this case; for that, if he should set those persons at liberty that are apprehended, he would be wanting to his own safety, and the safety of his government and people; on the other hand, if he should detain them, he is unwilling to do anything but what shall be fully warranted by law, which he hath so often declared he will preserve; and that, therefore, if those persons should deliver themselves by the Act of *Habeas Corpus*, there would be another difficulty. That his Majesty is likewise unwilling that excessive bail should be taken in this case, his Majesty remembering that to be one article of the grievances presented to him; that ordinary bail will not be sufficient; for men that carry on such designs, in hopes of succeeding, will not stick at forfeiting a small sum; and that, this falling out when the Parliament is sitting, his Majesty, therefore, thought fit to ask the advice of this House therein, and intends to advise with the Lords also.'

"*Resolved, nem. con.*, That the humble thanks of this House be returned to his Majesty, for his most gracious message in desiring the advice of this House.

"*Resolved*, That a temporary bill be brought in, to empower his Majesty to apprehend and detain all such persons as he shall have just cause to suspect are conspiring against the government.

Ordered, That Mr. Hamden, Sir Rich. Temple, Mr. Pollexfen, Mr. Sacheverell, Sir Tho. Lee, Sir Tho. Clarges, Sir John Holt, Mr. Brewer, do immediately withdraw into the Speaker's Chamber, and prepare the said bill, and bring the same in with all convenient speed.

* * "A bill for empowering his Majesty to apprehend and detain all such persons as he shall have just cause to suspect are conspiring against the government, was read the first time.

"*Resolved*, That the bill be read a second time, immediately.

"The said bill being read a second time:

"*Resolved*, That the said bill be committed, upon the debate of the House, to Sir Tho. Lee [and others], and they are to meet this afternoon at five o'clock, in the Speaker's Chamber.

"*March 4th.* * * * * * Sir Thomas Littleton reports from the Committee, to whom the bill for empowering his Majesty to apprehend and detain such persons, as he shall find just cause to suspect are conspiring against the government, was referred: That the Committee had thought fit to make several amendments to the bill. Which amendments he read in his place, with the coherence, and, after, delivered the same in at the clerk's table, where the same being all read over, and afterwards again, one by one, upon the questions severally put thereupon, were all agreed unto by the House.

"A motion being made, that there be another amendment to the bill, by the addition of the words, 'and also of all other laws and statutes any way relating to, or providing for the liberty of the subjects of this kingdom,' and the same being twice read:

"*Resolved*, That this House doth agree to the said amendment.

"Another amendment being proposed, by adding these words, 'and that this present Act shall continue until the said 17th day of April, and no longer;' and the same being twice read:

"*Resolved*, That this House doth agree to the said amendment.

"Another amendment being proposed, of these words, 'and is never to be drawn into precedent, or example, hereafter;'

"And the question being put, that the House do agree to the said amendment:

"It passed in the negative." (*Commons Journal, Vol.* 10, *pp.* 38, 39, 40.)

[A clause, enacting that the charges of the persons confined be paid out of the crown revenue, was not agreed to. The usual proviso was then added.

The bill finally passed, with a verbal alteration. (*Ib., pp.* 42, 43.)]

XIV.

Preamble of the Annual Mutiny Act.

1 *W. & M. ch.* 5.

"An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service. (6 *Stat. of the Realm*, 55.)

"Whereas the raising or keeping a Standing Army within this Kingdome in time of Peace unlesse it be with Consent of Parlyament is against Law And whereas it is judged necessary by Their Majestyes and this present Parlyament That during this time of Danger severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdom for the Common Defence of the Protestant Religion and for the reduceing of Ireland

"And whereas noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme Yet neverthelesse it being requisite for retaineing such Forces as are or shall be raised dureing this Exigence of Affaires in their Duty an exact Discipline be observed And that Soldiers who shall Mutiny or stirr up Seditions or shall desert Their Majestyes Service be brought to a more Exemplary and Speedy Punishment then the usual Forms of Law will allow

"Bee it therefore enacted," &c.

[*Since* 1 *Ann., st.* 2, *ch.* 20, (8 *Stat. of the Realm*, 209,) the following form has been used:]

"28 *and* 29 *Vict., ch.* 11.

"An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters. [7th April, 1865.]

"Whereas, the raising or keeping a Standing Army within the United Kingdom of *Great Britain* and *Ireland* in Time of Peace, unless it be with consent of Parliament, is against Law: And, whereas, it is adjudged necessary by Her Majesty and this present Parliament, that a Body of Forces should be continued for the Safety of the United Kingdom, the Defence of the Possessions of Her Majesty's Crown, and the Preservation of the Balance of Power in *Europe*, and that the whole number of such

Forces should consist of 142,477 Men, including 9,109, all Ranks, to be employed with the Depôts in the United Kingdom of *Great Britain* and *Ireland* of Regiments serving in Her Majesty's *Indian* Possessions, but exclusive of the numbers actually serving within Her Majesty's *Indian* Possessions: And, whereas, no Man can be forejudged of Life or Limb, or subjected in time of Peace to any Kind of Punishment within this Realm by Martial Law, or in any other manner than by Judgment of his Peers, and according to the Known and established Laws of this Realm; yet, nevertheless, it being requisite, for the retaining all the above Forces in their Duty, that an exact Discipline be observed, and that Soldeirs who shall Mutiny or stir up Sedition, or shall Desert Her Majesty's Service, or be guilty of Crimes and Offences to the Prejudice of Good Order and Military Discipline, be brought to a more exemplary and speedy Punishment than the usual Forms of the Law will allow:

"Be it therefore enacted" &c.

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Supreme Court of the United States.

DECEMBER TERM, 1865.

No. 350. EX PARTE.

In the Matter of Lambdin P. Milligan, Petitioner for a Writ of Habeas Corpus.

Brief in behalf of the United States.

H. POLKINHORN & SON, Printers.

2 Delobare 972

Supreme Court of the United States.

No. 350. Ex Parte.

In the Matter of Lambdin P. Milligan, Petitioner for a Writ of Habeas Corpus.

Brief in behalf of the United States.

The petitioner seeks from the Circuit Court of the United States in and for the District of Indiana, a writ of *Habeas Corpus*, to relieve him from imprisonment by the military authorities of the United States. He sets forth in his petition and the exhibits annexed the cause and reasons of his detention, alleging that on the fifth day of October, 1864, at his home in Indiana, he was arrested under the authority of the President, by order of Brevet Major General Alvin P. Hovey, at that time in command of the Military District of Indiana, within the geographical Military Department of the Ohio, and he has been held ever since under a military guard, as a military prisoner, by the authority of the President, at a military prison, in the city of Indianapolis. That after his arrest and imprisonment, the Judge Advocate of the department of the Ohio, preferred five several charges against him and his alleged confederates, with sixteen specifications, all of which are made part of the petition by "Exhibit A."

The charges are in brief:

1st. A conspiracy against the Government of the United States.

2nd. Affording aid and comfort to the rebellion against the authority of the United States.

3d. Inciting an insurrection.

4th. Disloyal practices.

5th. Violation of the laws of war.

The specifications under these charges set forth, with more or less particularity that in a time of actual war, the petitioner set on foot, with others, a secret military organization, for the purpose of overthrowing the government. (Record, page 12.)

That he, with others, conspired to seize the United States and State Arsenals, and to release the prisoners of war confined in the military prisons, under charge of the military authorities; to arm these prisoners; to join with them such other forces as they could raise; and to march into Kentucky and Missouri; to co-operate with the rebel forces there. (*Record page* 13.) That the conspirators communicated with the enemy to induce them to invade the States of Kentucky, Indiana and Illinois, intending themselves to join and co-operate with the enemy in the event of such an invasion, and that they armed themselves for that purpose. (*Record page* 13, 14 *and* 15.) That the petitioner was an officer in a military force organized and armed for this and other purposes. (*Record page* 17.) That he advised and counselled the enrolled militia of the United States to disregard the authority of the United States, and to resist the draft then ordered to increase the army of the United States, and armed citizens of the State, for the purpose of resisting the draft. (*Record page* 15.) That he attempted to introduce the armed forces of the enemies of the United States into loyal States, to overthrow and destroy the authority of the United States. That all these practices and acts are alleged

to have been pursued and committed at several places "within the District of Indiana and within the military lines o the armies of the United States, and within the theatre of military operations which had been and was constantly threatened with invasion." (*Specifications passim.*)

All these acts are alleged to have been committed between the first day of October, 1863, and the first day of August, 1864, inclusive.

All of which charges and specifications were approved by General Hovey, and the petitioner was arraigned and tried thereon, by a Military Commission, previously appointed and convened by order of the military commander of the district, at Indianapolis, on the twenty-first day of October, 1864, and continued by adjournment from time to time to the first day of May, 1865.

After objecting to the jurisdiction of the Military Commission, the petitioner pleaded not guilty; but upon full hearing he was found guilty upon all the above recited charges and specifications, and by the Commission sentenced to death by hanging—two-thirds of the members of the Commission concurring therein.

The record, proceedings, findings and sentence being approved by the proper Commanders, and the record being forwarded for the action of the President, the sentence was approved and directed to be carried into execution on the second day of May, 1865. Afterwards the sentence was either respited or commuted.

Upon the hearing, the learned Judges of the Circuit Court certify for the decision of this Court these questions, viz:—

"1st. On the facts stated in the said petition and exhibits, ought a writ of Habeas Corpus to be issued according to the prayer of said petition?"

"2d. On the facts stated in the said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

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"3d. Whether upon the facts stated in said petition and exhibits, the Military Commission therein named had authority to try said Milligan, in manner and form as in said petition and exhibit stated?"

There is no allegation by the petitioner, in this his petition, under oath, that he is innocent of any of the things laid to his charge.

No question is raised by the petition, or in the questions submitted, upon the regularity of the proceedings or propriety of action of the Commission.

IT IS ASSUMED to be the well settled practice of the Courts of the United States, upon application for a writ of *Habeas Corpus*, that if it appear upon the facts stated by the petitioner, all of which shall be taken to be true, that he could not be discharged upon a return of the writ, then no writ will be issued. Therefore the questions resolve themselves into two, which, for convenience of argument, may be reversed thus:—

I. Has the Military Commission jurisdiction to hear and determine the case submitted to it?

II. The jurisdiction failing, had the military authorities of the United States a legal right, at the time of filing the petition, to detain the petitioner in custody as a military prisoner, or for trial before a civil court?

I. A Military Commission derives its powers and authority wholly from martial law; and by that law and by mili-

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tary authority only are its proceedings to be judged or reviewed.

Dynes vs. Hoover, 20 Howard, S. C., Rep. 78.

Vallandigham's case, S. C., Dec. Term, 1863.

II. MARTIAL LAW is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler.

Hansard's Parliamentary Debates, 3d series, vol. 95, page 80. Speech of the Duke of Wellington.

Opinions of Attorneys General, vol. 8, page 367.

III. MILITARY LAW is the rules and regulations made by the legislative power of the State for the government of its land and naval forces.

Kent's Commentaries, vol. 1, p. 341, Note A.

IV. THE LAWS OF WAR (when this expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, *flagranti bello.*

These several kinds of laws should not be confounded, as their adjudications are referable to distinct and different tribunals.

Infractions of the Laws of War can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations.

Offenses against Military Laws are determined by tribunals established in the acts of the legislature which create these laws—such as Courts Martial and Courts of Inquiry.

The officer executing Martial law is at the same time Supreme Legislator, Supreme Judge, and Supreme Executive.

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As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction he alone can judge; and his sole order punishes or acquits the alleged offender.

But the necessities and effects of warlike operations which create the law also give power incidental to its execution. It would be impossible for the Commanding General of an army to investigate each fact which might be supposed to interfere with his movements, endanger his safety, aid his enemy, or bring disorder and crime into the community under his charge. He, therefore, must commit to his officers, and in practice, to a board of officers, as a tribunal, by whatever name it may be called, the charge of examining the circumstances and reporting the facts in each particular case, and of advising him as to its disposition—the whole matter to be then determined and executed by his order.

Examination of Major André before board of officers, Colonial pamphlets, vol. 18.

Hence arise *Military Commissions*, to investigate and determine, not offenses against military law by soldiers and sailors, not breaches of the common laws of war by belligerents, but the quality of the acts which are the proper subject of restraint by martial law.

Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington, in the Revolutionary war, had repeated recourse to Military Commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines. They are familiarly recognized in express terms by the Acts of Congress of July 17th, 1862, chap. 201, sect. 5; March 18th, 1863, chap. 75, sect. 36; Resolution No. 18, March 11th, 1862; and their jurisdiction over certain offences is also recognized by these acts.

But, as has been seen, Military Commissions do not thus derive their authority. Neither is their jurisdiction confined to the classes of offenses therein enumerated.

Assuming the jurisdiction where military operations are being in fact carried on, over classes of military offenses, Congress, by this legislation, from considerations of public safety has endeavored to extend the sphere of that jurisdiction over certain offenders who were beyond what might be supposed to be the limit of actual military occupation.

As the war progressed, being a civil war, not unlikely, as the facts in this record abundantly show, to break out in any portion of the Union, in any form of insurrection, the President, as Commander-in-Chief, by his proclamation of September 24th, 1862, "ordered that during the existing insurrec-"tion, and as a necessary means for suppressing the same, all "rebels and insurgents, their aiders and abettors, within the "United States, and all persons discouraging volunteer enlist-"ments, resisting militia drafts, or guilty of any disloyal prac-"tice, affording aid and comfort to rebels, against the authori-"ty of the United States, shall be subject to martial law, and "liable to trial and punishment by courts-martial or military "commission.

"Second. That the writ of *habeas corpus* is suspended in "respect to all persons arrested, or who now, or hereafter du-"ring the rebellion shall be, imprisoned in any fort, camp, "arsenal, military prison, or other place of confinement, by "any military authority, or by the sentence of any court-mar-"tial or military commission."

This was an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President. (Brown vs. the United States, 8 Cranch, 153.)

This Proclamation, which by its terms was to continue during the then existing insurrection, was in full force during the pendency of the proceedings complained of, at the time of the filing of this petition, and is still unrevoked or

unannulled by any counter Proclamation, Treaty or Law of Congress.

While we do not claim that any legislation of Congress was needed to sustain this Proclamation of the President, it being clearly within his power, as Commander-in-Chief, to issue it, yet, if it is claimed that legislative action is necessary to give validity to it, Congress has seen fit to expressly ratify thi Proclamation by the act of March 3d, 1863, by declaring that the President. whenever in his judgment the public safety may require it, is authorized to suspend the writ of Habeas Corpus in any case throughout the United States, and in any part thereof. And the fourth Section further declares, "that any order of the President, or under "his authority, made at any time during the existence of the "present rebellion, shall be a defence in all courts to any ac- "tion or prosecution, civil or criminal, pending or to be com- "menced, for any search, seizure, arrest, or imprisonment, "made, done, or committed, or acts omitted to be done, under "and by virtue of such order."

The offences for which the petitioner for the purpose of this hearing is confessed to be guilty, are the offences enumerated in this Proclamation. The prison in which he is confined is a "military prison" therein mentioned. As to him, his acts and imprisonment, the writ of *Habeas Corpus* is expressly suspended.

The time of the commencement and the duration of the insurrection are matters of which the Court will take judicial notice, (*Prize cases, 2d Black* 641.)

Apparently admitting by his petition that a Military Commission might have jurisdiction in certain cases, the Petitioner seeks to except himself by alleging that he is a citizen of Indiana and has never been in the Naval or Military service of the United States, or since the commencement of the rebellion a resident of a rebel State. "Therefore it has "been and still is wholly out of his power to have acquired "belligerent rights and to have placed himself in such a rela- "tion to the government as to enable him to violate the laws "of war."

But we submit that neither residence, nor propinquity, to the field of actual hostilities is the test to determine who is or who is not subject to martial law even in a time of foreign war, and certainly not in a time of civil insurrection. The Commander-in-Chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines.

These crimes of the petitioner were committed within the State of Indiana, where his arrest, trial and imprisonment took place; within a military district of a geographical military department, duly established by the Commander-in-Chief; within the military lines of the army, and upon the theatre of military operations; in a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; its citizens were liable to be made soldiers, and were actually ordered into the ranks; and to prevent their becoming soldiers the petitioner conspired with, and armed others to interfere.

This record does not raise the question which was argued in another case and before another tribunal, whether a military commission has jurisdiction over a purely civil crime; for the acts of which the petitioner has been found guilty are not only civil but military offenses. These are, holding communication with the enemy, conspiring with others to seize the munitions of war stored in the arsenals, to liberate prisoners of war held for exchange, and organizing an armed force against the Government. He is not less an enemy because a traitor, not less a traitor because an enemy.

Thus far the discussion has proceeded without reference to the effect of the Constitution upon war making powers, duties and rights, save to that provision which makes the President Commander-in-Chief of the Armies and Navies. Does the Constitution provide restraint upon the exercise of this power?

The people of every sovereign State possess all the rights and powers of government. The people of the States in forming a "more perfect Union to insure domestic tranquility, and to provide for the common defense," have vested the power of making and carrying on war in the General Government, reserving to the States, respectively, only the right to repel invasion and suppress insurrection "of such imminent danger as will not admit of delay." This right and power thus granted to the General Government is in its nature entirely *Executive*, and in the absence of Constitutional limitations would be wholly lodged in the President, as Chief Executive Officer and Commander-in-Chief of the Armies and Navies.

Lest this grant of power should be so broad as to tempt its exercise in initiating war, in order to reap the fruits of victory, and therefore be unsafe to be vested in a single branch of a Republican Government, the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, and of provoking it by issuing Letters of Marque and Reprisal—consequently, also, the power of raising and supporting armies, maintaining a navy, employing the militia, and of making rules for the government of all armed forces while in the service of the United States.

To keep out of the hands of the Executive the "fruits of victory" Congress is also invested with the power to "make rules for the disposition of captures by land or water."

After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities and duties of the occasion, their extent and duration.

(8 Cranch; Luther vs. Borden, 7 Howard, 42–45; Knott vs. Martin, 12 Wheaton, R. 19)

During the war his powers must be without limit, because, if defending, the means of offense may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view—"to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.

(Hamilton Federalist, No. 26; Madison same, No. 41.)

These propositions are certainly axiomatic in the absence of all restraining legislation by Congress.

By the Constitution, as originally adopted, no limitations were put upon the war making and war conducting powers of Congress and the President, and after discussion and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that "no soldier shall be quartered in any house in time of peace without consent of the owner, or in *time of war* except in a manner prescribed by law."

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of *Habeas Corpus* in time of peace the Constitution takes it for granted that it will be suspended "in case of rebellion or invasion, (*i. e.*, in time of war,) when the public safety requires it."

IT IS CLAIMED that the 4th, 5th and 6th Articles of amendment are restraints upon the war making power.

It never could have been intended by the Second Article, declaring that "the right of the people to keep and bear arms shall not be infringed," to hinder the President from disarming insurrectionists, rebels and traitors in arms while carrying on war against them.

Nor that he would contravene the Fourth Article by searching and seizing their persons, houses, papers and effects, without a warrant upon probable cause, previously supported by oath; or that the Fifth Article would be violated in "depriving of life, liberty or property, without due process of law," the armed battalions of rebel foes of the country marching to attack the Capital, by killing some, making prisoners of others, and taking the arms, provisions and munitions of war of all.

All these amendments are in *pari materia,* and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why each and all of them are not.

The Fifth Article, confirming the right of presentment for crime, by its exception, in cases arising in the land or naval forces, or in the militia when in service in time of war or public danger—*i. e.* when under the control of the general government—makes provision for allowing Congress to enact rules and regulations for the government of the armed forces of the country in time of peace as well as in time of war, without thenecessity of subjecting the offender to indictment and trial by jury.

These are all Peace provisions of the Constitution, and, like all other Conventional and Legislative laws and enactments, are silent "*inter arma,*" when "*salus populi suprema est lex!*"

(John Quincy Adams, Debates in Congress, 1836.)

It is Claimed in the Petitioner's brief that if he is accused of any crime against the law it is under the Conspiracy Act of 1861, and that by its terms he can only be punished upon conviction in a District or Circuit Court.

We may well admit a portion of the offences charged are within the purview of that Act.

But that Act only provided for the punishment of a new offense before certain Courts, but did not oust the Military tribunals of their jurisdiction of military offenses.

It is a familiar exercise of Martial law to allow the Courts of a country, when it may be done with safety, to perform their ordinary functions, in regard to crimes committed among the people toward each other, but rarely, if ever, is any jurisdiction permitted, of crimes affecting the safety, well-being or movements of the occupying army.

But such exercise of civil power is wholly permissive, and subordinate to the military power; and whether it shall be exercised at all is entirely within his discretion. (See Wellington's speech, *ubi supra.*)

The Second and Third sections of the Act relating to *Habeas Corpus* of March 3d, 1863, apply only to those persons who are held as "State or political offenders," and not to those who are held as prisoners of war. The petitioner was as much a prisoner of war, as if he had been taken in action with arms in his hands.

These sections apply also only to those persons, the cause of whose detention is not disclosed, and not to those, who at the time when the lists by the provisions of said sections are to be furnished to the Court, are actually undergoing trial before military tribunals upon written charges made against them.

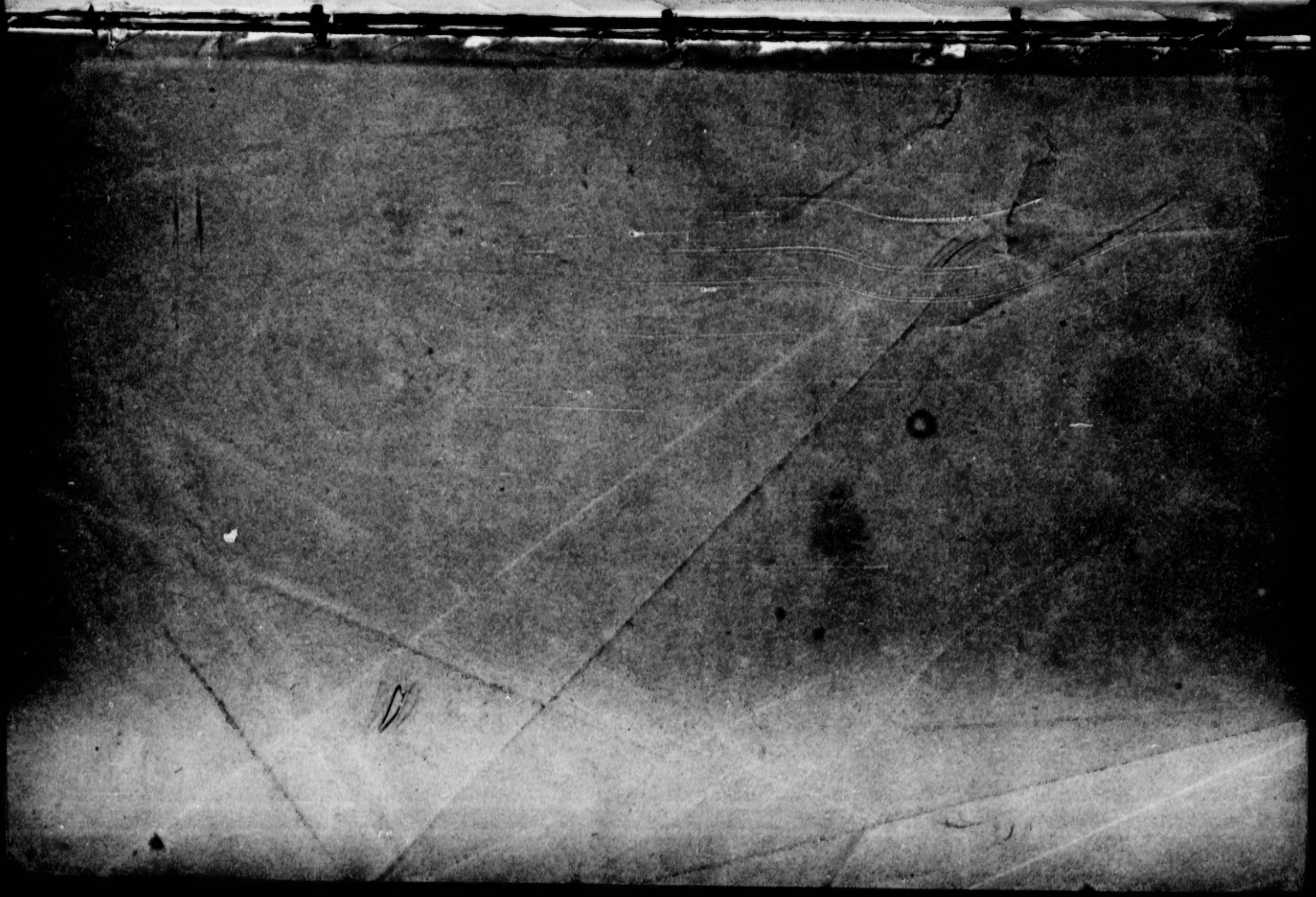
The law was framed to prevent imprisonment for an indefinite time without trial, not to interfere with the case of prisoners undergoing trial. Its purpose was to make it certain that such persons should be tried.

The Petitioner does not complain that he has been kept in ignorance of the charges against him, or that the investigation of those charges has been unduly delayed.

A single question further remains.

If the military tribunal has no jurisdiction, the petitioner may be held as a prisoner captured in war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the Military to the Civil authorities, to be tried for his crimes under the acts of Congress, and before the Courts which he has selected.

JAMES SPEED, *Attorney General.*
BENJ. F. BUTLER.



Supreme Court of the United States.

EX PARTE MULLIGAN *vs.* BOWLES.

BRIEF ON PART OF RELATORS.

The relators were arrested in Indiana by order of certain military officers, were afterwards tried by a body calling itself a military commission, and ordered to be hung. The sentence was first suspended and afterwards commuted to imprisonment for life. The trial took place when the Federal and State courts were open, and at a place where there was no impediment to the regular administration of justice.

POINTS OF LAW.

1. We insist that the whole proceedings were null and void from the beginning, contrary to the Constitution of the United States, inconsistent with the freedom of American citizens, derogatory to the common law of the land, and repugnant to the principles of natural justice.

2. The Constitution gives every person accused of crime the right to be tried before an ordained court and an impartial jury, and no power exists in any department of the Government to take away this right, or to suspend the Constitution and substitute martial law in its place.

3. These parties, if accused of any crime against the law, were charged with conspiracy under the act of 1861. By

the very terms of that law they could not be punished without conviction in a circuit or district court of the United States.

4. The act of 3d March, 1863, also declares that persons in the precise situation of the relators shall be handed over to the civil courts for trial, or discharged if no indictment be found against them by a grand jury.

5. The military necessity which justifies or excuses the exercise of martial law over persons not in the military service must be an actual not a fictitious necessity. Martial law which punishes without legal trial, can only be enforced at a place where war is actually blazing, where the courts are driven out, and a legal trial physically impossible. It cannot be continued an hour after this state of things ceases; nor can it be tolerated at one place because the courts are broken up by war or insurrection in another place. Our views on this point are more fully expressed by Sir James Mackintosh, in his great speech on the case of the Rev. Jno. Smith, delivered in the House of Commons, June 1, 1824. Mackintosh's Works, pp. 726, 734.

AUTHORITIES.

Hale's Comm. Law, 41-2-3.
3 Hallam's Const. History of England, 350.
1 do. do., 328.
1 Blackstone, 413.
1 De Lalme on British Constitution, 265-6, mentions Lieut. Frey's case, vol. 2, p. 982.
See for this case McArthur's Military Law.
See also London Gazette for 1746, in Cong. Library place marked.
Stephen's Definition of Martial Law, Com. Law, 561.
Hough's Military Laws, 511.
Wellington's Opinion of Martial Law as expressed in the House of Lords in 1851, Hough, 515.
Hickman's Naval Court Martial, 85.
O'Brien's American Military law, 222, 225, 226.
3 Benton's Abridgment of Debates, 504.
Debate on Jefferson's Application for Suspension of Habeas Corpus.
McIntosh's Speech on Smith's Case — McIntosh's Works, 726.

Brougham's Speech on same case—Brougham's Speeches.
See Edinburgh Review, vol. 40—Review of Smith's case.
Earl of Lancaster's case—Attainder Reversed, 1 Edward III.
Hale's Pleas of the Crown—499, 500.
Petition of Right, 5 Statutes of the Realm, fol. 24.
Geoffrey's case in France—Court of Cassation, June 29, 1832—24 Journal du Palais, p. 1218.
Lord McGuire's case—4 Howell's State Trials, 654, Prynn's argument for prosecution, p. 690.

These authorities, when considered in connection with the Constitution of the United States, show that all attempts to take the life, or liberty, or property, of an American citizen, without a judicial trial, under the circumstances attending this case, are clearly void.

J. S. BLACK,
J. A. GARFIELD,
Counsel for the Relators.

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ARGUMENT

OF THE

HON. JAMES A. GARFIELD

In the U. S. Supreme Court,

MARCH 6, 1866,

In the matter of ex-parte L. P. MILLIGAN, W. A. BOWLES, *and* STEPHEN HORSEY.

Counsel for the Petitioners, Hon. J. E. McDONALD, Hon. JAMES A. GARFIELD, Hon. J. S. BLACK, and Hon. DAVID DUDLEY FIELD. For the United States, Hon. B. F. BUTLER, Hon. JAS. SPEED, and Hon. HENRY STANBERRY.

Nullus Liber Homo capiatur, vel imprisonetur, aut dissiesietur aut utlagetur aut exuletur, aut aliquo alio modo destruatur; nec super eum ibimus, nec eum in carcere mittemus, nisi per legale judicium Parium suorum, vel per Legem Terræ.—MAGNA CHARTA, CAP. XLVIII.

REPORTED BY D. F. MURPHY.

WASHINGTON:
JOSEPH L. PEARSON, PRINTER,
511 Ninth St., near Penn. Avenue.
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ARGUMENT.

MAY IT PLEASE THE COURT.

In the months of September and October, 1864, LAMBDIN P. MILLIGAN, WILLIAM A. BOWLES, and STEPHEN HORSEY, natives of the United States and citizens of the state of Indiana, were arrested by order of ALVIN P. HOVEY, Major General commanding the military district of Indiana, and on the 21st day of the latter month, were placed on trial before a "Military Commission," convened at Indianapolis, by order of GEN. HOVEY, on the following charges, preferred by MAJ. HENRY L. BURNETT, Judge Advocate of the North-Western Military Department, viz:

1. "Conspiracy against the government of the United States."
2. "Affording aid and comfort to rebels against the government of the United States."
3. "Inciting insurrection."
4. "Disloyal practices."
5. "Violations against the laws of war."

The commission, overruling the objection of the accused against its authority to try them, proceeded with the trial, pronounced them guilty, and sentenced them to death by hanging. The sentence was approved on the 2d day of May, 1865; but before the day fixed for its execution, the President of the United States commuted it to imprisonment for life, and the prisoners are now confined in the penitentiary of Ohio.

On the 10th day of the same month they filed their petition in the Circuit Court of the United States for the District of Indiana, setting forth the above facts, and also declaring that while the petitioners were held in military custody, and more than twenty days after their arrest, a Grand Jury of the Circuit Court of the United States, for the District of Indiana, was convened at Indianapolis, the petitioners' place of confinement, and being duly impaneled, charged, and sworn for said district, held its sittings, and finally adjourned, without having found any bill of indictment, or made any presentment whatever against them; that at no time had they been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; that they had not been within the limits of any state whose citizens were engaged in rebellion against the United States, at any time during the war, but during all the time aforesaid, and for twenty years last passed, had been inhabitants, residents, and citizens of Indiana. The petitioners' claim to be discharged from the military custody was founded upon the provisions of an act of Congress of March 3d, 1863, entitled "An act relative to *habeas corpus*, and regulating judicial proceedings in certain cases."

On hearing the petition, the opinions of the judges of the circuit court were opposed, and they have certified to this court for its decision the following questions, viz:

1. On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued according to the prayer of said petition?

2. On the facts stated in said petition and exhibits, ought the petitioners to be discharged from custody as in said petition prayed?

3. Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said petitioners in manner and form as in said petition and exhibits is stated.

These preliminary proceedings have been so fully stated and examined by the gentleman who opened the cause (JUDGE MCDONALD) that I need not dwell upon them further.

I desire to say in the outset that the questions now before this court have relation only to constitutional law, and neither involve the guilt or innocence of the relators, nor the motives and patriotism of the officers who tried and sentenced them.

I trust I need not say in this presence, that in my estimation nothing in the calendar of infamy can be more abhorrent than the crimes with which the relators were charged; nothing that more fully deserves the swift vengeance of the law, and the execration of mankind. But the questions before Your Honors are not personal. They reach those deep foundations of law on which the Republic is built; and in their proper settlement are involved the highest interests of every citizen.

HAD THE MILITARY COMMISSION JURISDICTION LEGALLY TO TRY AND SENTENCE THE PETITIONERS?

Upon the determination of this question the whole cause rests.

If the commission had such jurisdiction, the petitioners are legally imprisoned, and should not be discharged from custody; nor should a writ of *habeas corpus* be issued in answer to their prayer.

If the military commission had not jurisdiction, the trial was void, the sentence illegal, and should not be further executed.

As a first step toward reaching an answer to this question, I affirm that *every citizen of the United States is under the dominion of law; that whether he be a civilian, a soldier, or a sailor, the Constitution provides for him a tribunal before which he may be protected if innocent, and punished if guilty of crime.*

In the fifth article of the amendments to the Constitution it is declared that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

This sweeping provision covers every person under the jurisdiction of the Constitution. To the general rule of "*presentment or indictment of a grand jury*" there are three exceptions: First, cases arising in the land forces; second, cases arising in the naval forces; third, cases arising in the militia when in actual service in time of war or public danger. All these classes are covered by express provisions of the Constitution. In whatever one of these situations an American citizen may

be placed, his rights are clearly defined, and a remedy is provided against oppression and injustice. The Constitution establishes the Supreme Court, and empowers Congress—

"To constitute tribunals inferior to the supreme court."

"To make rules for the government of the land and naval forces, and 'To provide for governing such part of the militia as may be employed in 'the service of the United States."

No other tribunal is authorized or recognized by the Constitution. No other is established by the laws of Congress.

For all cases not arising in the land or naval forces, Congress has amply provided in the Judiciary act of September 24, 1789, and the acts amendatory thereof.

For all cases arising in the naval forces, it has fully provided in the act of March 2, 1799, "for the government of the navy of the United States," and similar subsequent acts.

But since the opposing counsel do not claim to find authority for the tribunal before which the petitioners were tried, in either of these categories, I shall proceed to examine, somewhat minutely, the limits and boundaries of the military department; the character of its tribunals; the classes of persons who come within its jurisdiction; and the defences which the law has thrown around them.

We are apt to regard the military department of the government as an organized despotism in which all personal rights are merged in the will of the commander-in-chief. But that department has definitely marked boundaries, and all its members are not only controlled, but also sacredly protected by definitely prescribed law. The first law of the revolutionary Congress, passed September 20, 1776, touching the organization of the army, provided that no officer or soldier should be kept in arrest more than eight days without being furnished with the written charges and specifications against him; that he should be tried at as early a day as possible by a regular military court, whose proceedings were regulated by law, and that no sentence should be carried into execution till the full record of the trial had been submitted to Congress or to the commander-in-chief, and his or their direction be signified thereon.

From year to year Congress has added new safe-guards to protect the rights of its soldiers, and the rules and articles of war are as really a part of the laws of the land as the judiciary act or the act establishing the Treasury department.

If the humblest private soldier in the army be wronged by his commanding officer, he may demand redress by sending the statement of his grievance step by step through the appointed channels till it reaches the President or Congress, if justice be not done him sooner.

The main boundary line between the civil and military jurisdictions is the muster into service. Before that act the citizen is subject to the jurisdiction of the civil courts—after it, until his muster out, he is subject to the military jurisdiction in all matters of military duty.

This line has been carefully surveyed by the courts, and fixed as the lawful boundary.

They do not regard a citizen as coming under the jurisdiction of a federal court-martial, even when he has been ordered into the military service by the governor of his state, on requisition of the President, until he reaches the place of general rendezvous, and has been actually mustered into the

service of the United States. On this point I cite the case of Mills vs. Martin, 19 Johnson, N. Y. Reports. In that case, a militiaman, called out by the governor of the state of New York, and ordered by him to enter the service of the United States, on a requisition of the President for troops, refused to obey the summons, and was tried by a federal court-martial for disobedience of orders. The supreme court of the state of New York decided that until he had gone to the place of general rendezvous, and had been regularly enrolled, and mustered into the national militia, he was not amenable to the action of a court-martial composed of officers of the United States.

The judge, in giving his opinion, quoted the following language of Mr. Justice Washington, of the Supreme Court of the United States, in the case of Houston vs. Moore, 5 Wheaton :

"From this brief summary of the laws, it would seem that *actual ser-* 'vice was considered by Congress as the criterion of national militia ; and 'that the service did not commence until the arrival of the militia at the place 'of rendezvous. That is, the *terminus a quo*, the service, the pay, and sub- 'jection to the articles of war, are to commence and continue."

By the sixtieth article of war, the military jurisdiction is so extended as to cover those persons not mustered into the service, but necessarily connected with the army. It provides that—

"All sutlers and retainers to the camp, and all persons whatsoever, 'serving with the armies of the United States in the field, though not en- 'listed soldiers, are to be subject to orders according to the rules and 'articles of war."

That the question of jurisdiction might not be doubtful, it was thought necessary to provide by law of Congress that spies should be subject to trial by court-martial.

As the law stood for eighty-five years spies were described as "persons 'not citizens of, or owning allegiance to, the United States, who shall be 'found lurking" &c. Not until after the great rebellion began was this law so amended as to allow the punishment by court-martial of *citizens of the United States* who should be found lurking about the lines of our army to betray it to the enemy; for until then, be it said to the honor of our people, it had never been thought possible that any American citizen would become a spy, to aid the enemies of the republic ; but in 1862 the law was so amended that an American citizen, if found lurking about the lines of the army as a spy, in time of war, should be tried by a court-martial as though he were a spy of a foreign nation.

It is evident, therefore, that by no loose and general construction of the law can citizens be held amenable to military tribunals, whose jurisdiction extends only to persons mustered into the military service, and such other classes of persons as are, by express provisions of law, made subject to the rules and articles of war.

But even within their proper jurisdiction, *military courts are, in many important particulars, subordinate to the civil courts.* This is acknowledged by the leading authorities on this subject.

I read from O'Brien's Military Law, p. 222.

After discussing the general relations between the civil and military 'departments of the government, he says : "From this admitted prin- 'ciple, it would seem a necessary consequence that the Supreme Court of 'the United States has an inherent power over all military tribunals, of

'precisely the same nature as that which it exerts and exercises over infe-
'rior courts of civil jurisdiction. Any mandatory or prohibitory writ,
'therefore, emanating from the Supreme Court of the United States, and
'addressed to a court martial, would demand the most unhesitating obedi-
'ence on the part of the latter. Whether in the absence of a special law
'to that effect, the same obedience is due to a writ coming from a circuit
'or a district court of the Union, and directed to a court-martial assembled
'in the district or circuit, does not appear to be so clear. A military
'tribunal would doubtless obey such a writ. As to state courts, the case
'is very different. Military courts are entirely independent of them;
'their powers are derived from a distinct, separate, and independent source.
'In regard to the courts of the United States, there can be no question.
'Each individual member of a court-martial is also liable to the supreme
'courts of civil judicature, not only for any abuse of power, but for any
'illegal proceedings of the court, if he has voted for, or participated in the
'same."

Again, on page 225, the same author says:

"The authority of courts-martial is sometimes extended by executive
'governments, subjecting, by proclamation, certain districts or countries
'to the jurisdiction of martial law during the existence of a rebellion. But
'in all such cases a court martial ought to be fully assured that the war-
'rant or order under which they are assembled is strictly legal, and that
'the prisoners brought before them were actually apprehended in the par-
'ticular district or country which may have been subjected to martial law,
'and during the period that the proclamation was actually in force. Any
'error in these particulars would render their whole proceedings illegal."

In further vindication of my last proposition, I will cite a few

PRECEDENTS FROM ENGLISH AND AMERICAN PRACTICE.

1. A Lieutenant Frye, serving in the West Indies in 1743 on board the Oxford, a British man-of-war, was ordered by his superior officer to assist in arresting another officer and bringing him on board the ship as a prisoner. The lieutenant, doubting the legality of the order, demanded what he had, according to the customs of the naval service, a right to demand, a written order before he would obey the command. For this he was put under arrest, tried by a naval court-martial, and sentenced to fifteen years imprisonment, and to be forever debarred from serving the King. He was sent to England to be imprisoned, but was released by order of the Privy Council. In 1746 he brought an action before a civil court against the president of the court-martial, Sir Chandler Ogle, and damages of £1,000 were awarded him for his illegal detention and sentence; and the learned judge informed him that he might also bring his action against any member of the court-martial. Rear Admiral Mayne and Captain Rentone, who were members of the court that tried him, were at the time, when damages were awarded to Lieut. Frye, sitting on a naval court-martial for the trial of Vice Admiral Lestock. The lieutenant proceeded against them, and they were arrested by a writ from the C. B. The order of arrest was served upon them just as the court-martial adjourned, one afternoon. Its members, fifteen in number, immediately re-assembled and passed resolutions declaring it a great insult to the dignity of the naval service that any person, however high in civil authority,

should order the arrest of a naval officer for any of his official acts. The Lord Chief Justice (Sir John Willes) immediately ordered the arrest of all the members of the court, who signed the resolutions, and they were arrested. They appealed to the King, who was very indignant at the arrest. The judge, however, persevered in his determination to maintain the supremacy of civil law, and after two months' examination and investigation of the cause all the members of the court-martial signed an humble and submissive letter of apology, begging leave to withdraw their resolutions, in order to put an end to further proceedings. When the Lord Chief Justice had heard the letter read in open court he directed that it be recorded in the Remembrance Office, "to the end," as he said, "that the present and future ages may know that whosoever set themselves up in opposition to the law, or think themselves above the law, will, in the end, find themselves mistaken." The history of the case will be found in McArthur on Courts-martial, Vol. I., pages 268–271. (See also London Gazette for 1745–6, Library of Congress.)

2. I beg leave to cite the case of Wilson vs. McKenzie, in 7 Hill, New York Supreme Court Reports, page 95. This court will remember the remarkable mutiny in 1842, on board the brig Somers, in which a son of the then Secretary of the Treasury of the United States was tried by court-martial for mutiny, and executed at the yard-arm. It was proved that a mutiny of very threatening aspect had broken out; and that the lives of the captain and his officers were threatened by the mutineers. Among the persons arrested was the plaintiff, Wilson, an enlisted sailor, who being supposed to be in the conspiracy, was knocked down by the captain, ironed, and held in confinement for a number of days. When the cruise was ended, Wilson brought suit against the captain for illegal arrest and imprisonment. The cause was tried before the Supreme Court of New York; and His Honor, Chief Justice Nelson, delivered the opinion of the court. He says, page 97: "The material question presented in this 'case is, whether the common-law courts have any jurisdiction of pe:-'sonal wrongs committed by a superior officer of the navy upon a subor-'dinate, while at sea and engaged in the public service."

* * * * * * * *

"Actions of trespass for injuries to the person have been frequently 'brought and sustained in the common-law courts of England, against 'naval as well as military commanders, by their subordinates, for acts done 'both at home and abroad under pretence and color of naval and military 'discipline.—(See Wall v. McNamara, and Swinton v. Moller, stated in '1 T. R., 536–7; also Mostyn v. Fabrizas, Cowp. 161; Warden v. 'Bailey, 4 Taunl., 67; 4 Maule and Selw., 400, S. C.; and Hannaford v. 'Hunn, 2 Carr and Payne, 148.)"

* * * * * * * *

"There are also many cases in the books where actions have been sus-'tained against members of courts-martial, naval and military, who have 'exceeded their authority in the infliction of punishment."—"(See 4 Taunt., '70–75, and the cases there cited.)" * * * *

"It was suggested in the argument that inasmuch as he (Wilson) was in 'the service of the United States when the acts complained of were done, 'the courts of this state as a matter of comity and policy should decline 'to take jurisdiction; * * but I am of opinion that the de-

'murrer is well taken and that the plaintiff (Wilson) is entitled to judg-'ment."

Ordered accordingly.

3. As a clear and exhaustive statement of the relation between civil and military courts, I quote from an opinion of this court in the case of Dynes v. Hoover, 20 Howard, 82:

"With the sentences of courts-martial which have been convened regu-'larly, and have proceeded legally, and by which punishments are directed, 'not forbidden by law, or which are according to the laws and customs of 'the sea, civil courts have nothing to do, nor are they in any way alter-'able by them. If it were otherwise, the civil courts would virtually 'administer the rules and articles of war, irrespective of those to whom 'that duty and obligation has been confided by the laws of the United 'States, from whose decisions no appeal or jurisdiction of any kind has 'been given to the civil magistrate or civil courts. But we repeat, if a 'court-martial has no *jurisdiction over the subject-matter of the charge* it 'has been convened to try, or shall inflict a punishment *forbidden by the* '*law*, though its sentence shall be approved by the officers having a re-'visory power of it, *civil courts* may, on an action by a party aggrieved by 'it, inquire into the want of the court's jurisdiction and give him redress. '(Harman v. Tappenden, 1 East., 555; as to ministerial officers, Mar-'shall's case, 10 Cr., 76; Morrison v. Sloper, Wells, 30; Parton v. 'Williams, B. and A., 330; and as to justices of the peace, by Ld. Ten-'terden, in Basten v. Carew, 3 B. and C., 653; Mules v. Calcott, 6 'Bins., 85.)

"Such is the law of England. By the mutiny acts, courts-martial 'have been created with authority to try those who are a part of the army 'or navy for breaches of military or naval duty. It has been repeatedly 'determined that the sentences of those courts are conclusive in any action 'brought in the courts of common law. But the courts of common law 'will examine whether courts-martial have exceeded the jurisdiction given 'them, though it is said, 'not, however, after the sentence has been rati-'fied and carried into execution.' (Grant v. Gould, 2 H. Black, 69; 'Ship Bounty, 1 East., 313; Shalford's case, 1 East., 313; Mann v. 'Owen, 9 B. and C., 595; in the matter of Poe, 5 B. and A., 681, on a 'motion for a prohibition.)"

I hold it, therefore, established, that the Supreme Court of the United States may inquire into the question of jurisdiction of a military court; may take cognizance of extraordinary punishment inflicted by such a court not warranted by law, and may issue writs of prohibition or give such other redress as the case may require. It is also clear that the Constitution and laws of the United States have carefully provided for the protection of individual liberty and the right of accused persons to a speedy trial before a tribunal established and regulated by law.

The petitioners must, as I have already shown, be placed in one of four categories. First, they were either in the naval service, or second, in the military service, or third, belonged to the militia and were called out to serve by order of the President in the national militia; or if neither of these three, nor so connected with them as to be placed by law under the naval or military jurisdiction, then they were simply civilians, and subject exclusively to the jurisdiction of the civil courts. It is set forth in the petition, and not denied by the opposing counsel, that they were in neither of the first three classes, nor connected with them. They must therefore

belong to the fourth class, unless a fifth should be added, as the learned counsel on the other side have suggested, and it be declared that they were prisoners of war; but of that I shall speak hereafter.

Under such circumstances it is not surprising that the learned counsel should go beyond the Constitution, beyond the civil, the naval, and even the military law, to find a basis on which they may rest the jurisdiction of the tribunal before which the petitioners were tried. They tell us frankly that they do not find its justification either in the civil or military laws of the land.

The Honorable Attorney General and his distinguished colleague (GEN. BUTLER) declare in their printed brief, pp. 4 and 5, that—

I. "A MILITARY COMMISSION *derives its power and authority wholly 'from martial law; and by that law, and by military authority only are its 'proceedings to be judged or reviewed;" that—*

II. "MARTIAL LAW *is the will of the commanding officer of an armed force, 'or of a geographical military department expressed in time of war, within 'the limits of his military jurisdiction, as necessity demands and prudence 'dictates, restrained or enlarged by the orders of his military chief or 'supreme executive ruler,*" and that "*the officer executing* MARTIAL LAW *is 'at the same time supreme legislator, supreme judge, and supreme executive.*"

To give any color of plausibility to this novel proposition, they were compelled not only to ignore the Constitution, but to declare it suspended; its voice drowned in the thunders of war. Accordingly, with consistent boldness, they declare (Brief, p. 13) that the third, fourth, and fifth articles, of amendments "are *all peace provisions of the Constitution, and like all other 'conventional and legislative laws and enactments are silent 'inter arma,' 'when 'salus populi suprema est lex.'*" Applying these doctrines to this cause they hold that from the 5th day of October, 1864, to the 9th of May, 1865, martial law alone existed in Indiana; that it silenced not only the civil courts, but all the laws of the land, and even the Constitution itself; and during that silence the executor of martial law could lay his hand upon every citizen, could not only suspend the writ of *habeas corpus*, but could create a court which should have the exclusive jurisdiction over the citizen to try him, sentence him, and put him to death.

We have already seen that the Congress of the United States raises and supports armies, provides and maintains navies, and makes the rules and regulations for the government of both; but it would appear from the teachings of the learned counsel on the other side, that when Congress has done all these things—when, in the name of the Republic, and in order to put down rebellion and restore the supremacy of law, it has created the grandest army that ever fought—the power thus created rises above its source and destroys both creator and law.

They would have us believe that the government of the United States has evoked a spirit which it cannot lay—has called into being a power which at once destroyed and superseded its author, and rode, in uncontrolled triumph, over citizen and court, Congress and Constitution.

All this mockery is uttered before this august court, whose every member is sworn to administer the law in accordance with the Constitution!

This monstrous assumption I shall now proceed to examine.

MARTIAL LAW DEFINED.

And now what is martial law? It is a new term to American jurispru-

dence ; and I congratulate this court that never before in the long history of this republic has that word rung out its lawless echoes in this sacred chamber.

Mr. BUTLER. Did not the decision in the case of Luther vs. Borden have something to do with martial law ?

Mr. GARFIELD. It was not the subject decided by the court, and only remotely analogous to this case.

The claim to exercise martial law in that case was under the old charter of Charles II. in Rhode Island, and not under the Constitution.

1. Sir Matthew Hale, in his History of the Common Law, (Runnington's edition, London, 1820,) pp. 42–3, says :

"Touching the business of martial law, these things are to be observed, 'viz :

"*First.*—That in truth and reality it is not a law but something indulged 'rather than allowed as a law ; the necessity of government, order, and 'discipline in an army is that only which can give those laws a counte-'nance *quod enim necessitas cogit defendi.*

"*Secondly.*—This indulged law was only to extend to members of the 'army, or to those of the opposed army, and never was so much indulged 'as intended to be executed or exercised upon others, for others who had 'not listed under the army had no color or reason to be bound by military 'constitutions applicable only to the army, whereof they were not parts, 'but they were to be ordered and governed according to the laws to which 'they were subject, though it were a time of war.

"*Thirdly.*—That the exercises of martial law, whereby any person should 'lose his life, or member, or liberty, may not be permitted in time of peace 'when the king's courts are open for all persons to receive justice accord-'ing to the laws of the land. This is declared in the Petition of Right, 3 'Car., 1, whereby such commissions and martial law were repealed and 'declared to be contrary to law."

2. Blackstone quotes the above approvingly, and still further enforces the same doctrine. Book 1, pp. 413–4.

3. Wharton, in his Law Lexicon, 3d edition, p. 578, says :

"Martial law is that rule of action which is imposed by the military 'power. It has no place in the institutions of this country (Great Britain) 'unless the articles of war established under the military acts be consid-'ered as of that character. The prerogative of proclaiming martial law 'within this kingdom is destroyed, as it would appear, by the Petition of 'Right."

4. Lord Wellington defined martial law as "The will of the command-'ing general exercised over a conquered or occupied territory." This defi-nition was given by him in his dispatches from the Peninsula, (vol. V.) and subsequently repeated in Parliament in 1851. In the same debate, Lords Cottenham and Campbell, and the attorney general, Sir. J. Jervis, declared that "Martial law was the setting aside of all law, and acting under mil-'itary *power*, in circumstances of great emergency—a proceeding which 'requires to be followed up by an act of indemnity."

This is the kind of law to which the gentlemen appeal to establish the validity of the court that tried the petitioners.

In order to trace the history and exhibit the character of martial law, I shall refer to several leading

PRECEDENTS IN ENGLISH AND AMERICAN HISTORY.

1. The Earl of Lancaster. In the year 1322, the Earl of Lancaster and the Earl of Hereford rebelled against the authority of Edward II. They collected an army so large that Edward was compelled to raise 40,000 men to withstand them. The rebellious earls posted their forces on the Trent and the armies of the king confronted them. They fought at Boroughbridge; the insurgent forces were overthrown; Hereford was slain and Lancaster taken in arms at the head of his army, and amid the noise of battle, was tried by a court-martial, sentenced to death, and executed. When Edward III. came into power, eight years later, on a formal petition presented to Parliament by Lancaster's son, setting forth the facts, the case was examined and a law was enacted reversing the attainder and declaring:

"1. That in time of peace no man ought to be adjudged to death for 'treason or any other offence without being arraigned and held to answer. '2. That regularly *when the king's courts are open it is a time of peace in 'judgment of* law; and 3. That no man ought to be sentenced to death, by 'the record of the king, without his legal trial *per pares.*"

Hale's Pleas of the Crown, pp. 499, 500. Hume, vol. 1, p. 159.

I call attention to this case as a remarkable illustration of some of the points in the cause before us. This man was taken in arms at the head of his army and in battle. He was immediately tried by court-martial and executed; but it was declared, in the decree that reversed the attainder, that he might have been tried by the courts of the land, and *therefore*, for the purposes of his trial, *it was a time of peace*, that he might have been presented, indicted, and regularly tried before the civil tribunal, and *therefore* the whole proceeding was illegal. So carefully was the line drawn between civil and martial law five hundred years ago!

2. Sir Thomas Darnell. He was arrested in 1625 by order of the King for refusing to pay a tax which he regarded as illegal. He was arrested and imprisoned. A writ of *habeas corpus* was prayed for, but answer was returned by the court that he had been arrested by special order of the King, and that was held to be a sufficient answer to the petition. Then the great cause came up to be tried in Parliament, whether the order of the King was sufficient to override the writ of *habeas corpus*, and after a long and stormy debate, in which the ablest minds in England were engaged, the Petition of Right, of 1628, received the sanction of the King. In that statute it was decreed that the King should never again suspend the writ of *habeas corpus;* that he should never again try a subject by military commission—and since that day, no King of England has presumed to usurp that high prerogative which belongs to Parliament alone.

3. For the purpose of citing a passage in the argument of Counsellor Prynn, I call attention to the trial of Lord Macguire, before the Court of King's Bench, in 1645. The record of the case will be found in 4 State Trials, pages 690–691.

Lord Macguire was the leader of the great Irish rebellion of 1841, during the progress of which more than 100,000 men, women, and children were murdered under circumstances of the greatest brutality. Lord Macguire was arrested and held until order had been restored; and in 1645 was brought before the King's Bench for trial. Mr. Prynn, counsel for the crown, published his argument in the case, in order, as he says, to vindicate the laws of England "in trying this notorious offender, 'guilty of the horridest, universalest treason and rebellion that ever

'broke forth in Ireland; and that in a time of open war both in Ireland 'and England, only by a legal indictment and indifferent sworn jury 'of honest and lawful freeholders, according to the known laws and 'statutes of the realm; not in a court-martial, or any other new-minted 'judicature, by an arbitrary, summary, illegal, or martial proceeding, 'without any lawful presentment, indictment, or trial by a sworn, im-'partial, able jury, resolved to be diametrically contrary to the fundamen-'tal laws, customs, great charters, statutes of the realm, and inherent liberty 'of the subject, especially in time of peace when all other courts of justice 'are open, and of every dangerous consequence, and thereupon especially 'prohibited and enacted against"

After giving a long list of references to authorities, he goes on to say that the law is vindicated still more "in allowing him a free, honorable 'trial upon an indictment, first found upon oath by the grand jury, and 'then suffering him to take not only his particular challenges by the poll 'to every of the jurors returned, upon a *voyre dire*, (not formerly heard of, 'yet allowed him, as reasonable, to take away all color of partiality or 'non-indifference in the jurors,) whereupon every juryman was examined 'before he was sworn of the jury, whether he had contributed or advanced 'any moneys upon the propositions for Ireland, or was to have any share 'in the rebels' lands in Ireland, by act of Parliament, or otherwise. But 'likewise in permitting him to take his peremptory challenge to thirty-five 'of the two juries returned, without any particular cause alleged, which 'liberty—our laws allowing men, *in favorem vitæ*, and because there may 'be private causes of just exceptions to them, known to the prisoner, not 'fit to be revealed, or for which he wants present proof, and that in case 'of high treason, as well as of felony, the court thought just and equal to 'allow the same to him, though a notorious Irish rebel."

4. The Bill of Rights of 1688. The house of Stuart had been expelled and William had succeeded to the British throne. Great disturbances had arisen in the realm in consequence of the change of dynasty. Plots were formed in favor of James in all parts of England. The King's person was unsafe in London. He informed the Lords and Commons of the great dangers that threatened the Kingdom, and reminded them that he had no right to declare martial law, to suspend the writ of *habeas corpus*, or to seize and imprison his subjects on suspicion of treason or intended outbreak against the peace of the realm. He laid the case before them and asked their advice and assistance.

In answer, Parliament passed the celebrated *habeas corpus* act. Since that day, no king of England has dared to suspend the writ. It is only done by Parliament.

5. Governor Wall. In the year 1782, Joseph Wall, governor of the British colony at Goree, in Africa, had under his command about five hundred British soldiers. Suspecting a mutiny about to break out in the garrison, he assembled them on the parade ground, held a hasty consultation with his officers, and immediately ordered Benjamin Armstrong, a private, and supposed ring-leader, to be seized, stripped, tied to the wheel of an artillery-carriage, and with a rope one inch in diameter to receive eight hundred lashes. The order was carried into execution, and Armstrong died of his injuries. Twenty years afterward Governor Wall was brought before the most august civil tribunal of England to answer for the murder of Armstrong. Sir Archibald McDonald, Lord Chief Bar't of the Court of the Exchequer, Sir Soulden Lawrence, of the King's Bench, Sir Giles Rooke, of

the Common Pleas, constituted the court. Wall's counsel claimed that he had the power of life and death in his hands in time of mutiny; that the necessity of the case authorized him to suspend the usual forms of law; that as governor and military commander-in-chief of the forces at Goree, he was the sole judge of the necessities of the case. After a patient hearing before that high court, he was found guilty of murder, was sentenced and executed.—(28 State Trials, p. 51; see also Hough's Mil. Law, pp. 537–540.)

I now ask your attention to precedents in our own colonial history.

6. On the 12th day of June, 1775, General Gage, the commander of the British forces, declared martial law in Boston. The battles of Concord and Lexington had been fought two months before. The colonial army was besieging the city and its British garrison. It was but five days before the battle of Bunker Hill. Parliament had, in the previous February, declared the colonies in a state of rebellion. Yet, by the common consent of English jurists, General Gage violated the laws of England, and laid himself liable to its penalty, when he declared martial law.

This position is sustained in the opinion of Mr. Justice Woodbury, in Luther vs. Borden, 7 Howard, p. 65. (For a history of the transaction see Annual Register for 1775, p. 133.)

7. On the 7th day of November, 1775, Lord Dunmore, declared martial law throughout the commonwealth of Virginia. This was long after the battle of Bunker Hill, and when war was flaming throughout the colonies; yet he was denounced by the Virginia Assembly for having assumed a power which the King himself dared not exercise, as it "annuls the law of the land, and introduces the most execrable of all systems, martial law." Mr. Justice Woodbury declares (7 Howard, p. 65) the act of Lord Dunmore unwarranted by British law.

8. The practice of our Revolutionary fathers on this subject is most instructive. Their conduct throughout the great struggle for Independence was equally marked by respect for civil law, and jealousy of martial law. Indeed, it was one of the leading grievances set forth in the Declaration of Independence, that the King of Great Britain had "affected to render the military independent of, and superior to the civil power;" and though Washington was clothed with almost dictatorial powers, he did not presume to override the civil law, or disregard the orders of the courts, except by express authority of Congress or the states.

In his file of general orders, covering a period of five years, there are but four instances in which civilians appear to have been tried by a military court, and all these trials were expressly authorized by resolutions of Congress.

In the autumn of 1777, the gloomiest period of the war, a powerful hostile army landed at Chesapeake bay, for the purpose of invading Maryland and Pennsylvania. It was feared that the disloyal inhabitants along his line of march would give such aid and information to the British commander as to imperil the safety of our cause.

Congress resolved "That the executive authorities of Pennsylvania and 'Maryland be requested to cause all persons within their respective states, 'notoriously disaffected, to be forthwith apprehended, disarmed, and secured 'till such time as the respective states think they can be released without 'injury to the common cause."

The governor authorized the arrests, and many disloyal citizens were taken into custody by Washington's officers, who refused to answer the

writ of *habeas corpus* which a civil court issued for the release of the prisoners. Very soon afterwards the Pennsylvania legislature passed a law indemnifying the governor and the military authorities, and allowing a similar course to be pursued thereafter *on recommendation of Congress or the commanding officer of the army.* But this law gave authority only to arrest and hold—not to try; and the act was to remain in force only till the end of the next session of the general assembly. So careful were our fathers to recognise the supremacy of civil law, and to resist all pretensions of the authority of martial law!

9. I pass next to notice an event that occurred under the Confederation, before the Constitution was adopted: I refer to Shay's rebellion in 1787—that rebellion which was mentioned by Hamilton in the Federalist as a proof that we needed a strong central government to preserve our liberties. During all that disturbance there was no declaration of martial law, and the *habeas corpus* was only suspended for a limited time and with very careful restrictions. Governor Bowdoin's order to General Lincoln, on the 19th of January, 1787, was in these words: "Consider yourself in all your military offensive operations constantly as 'under the direction of the civil officer, save where any armed force shall 'appear to oppose you, marching to execute these orders."

10. I refer next to a case under the Constitution, the rebellion of 1793 in Western Pennsylvania. President Washington did not march with his troops until the judge of the United States district court had certified that the marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that "the object of the expedition was to assist the marshal of the district to make prisoners." Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject that he gave his orders with the greatest care, and went in person to see that they were carefully executed. He issued orders declaring that "the army should not consider 'themselves as judges or executioners of the laws, but only as employed 'to support the proper authorities in the execution of the laws."

11. I next refer to an incident connected with the Burr conspiracy in 1807. The first developments of the plot were exceedingly alarming. Reports were forwarded to President Jefferson, and by him communicated confidentially to the Senate of the United States, with his recommendation that Congress pass a law authorizing the suspension, for a limited period, of the writ of *habeas corpus.* On the 26th day of January the Senate, by a unanimous vote, passed a bill authorizing the suspension of the writ for three months, in cases of persons who were charged *under oath* with treason or misprision of treason. Thus carefully limited and restricted, the bill was sent, under the seal of secrecy, to the House of Representatives. When it was read, the doors were immediately opened; a motion was made to reject the bill, that it might not even reach its first reading; and after a very able debate of five days, it was rejected by a vote of 113 to 19.

Not content, even, with that decided expression of sentiment, two weeks later, on the 17th of February, a resolution was introduced into the House ordering the Committee on the Judiciary "to bring in a bill more thoroughly to protect the rights of American citizens from arrest and imprisonment under color of authority of the President of the United States." After a very searching and able debate, it was concluded that existing laws

afforded ample protection; but so anxious were the representatives of the people to place the safety of the citizen beyond the reach of doubt, that the resolution came within two votes of passing in the House. The vote stood 58 yeas to 60 nays; and that, too, in the very midst of the threatened conspiracy. The full history of this legislative action will be found in Benton's Abridgment of Congressional Debates, vol. 1, pp. 504 to 542.

I will remark in this connection, that though President Jefferson recommended the passage of the act referred to, yet, in his correspondence, vol. 2, pp. 274 and 291, he subsequently expressed his opinion that it was unwise even in insurrection to suspend the writ of *habeas corpus*.

So jealous were our people of any infringement of the rights of the citizen to the privileges of the writ, that in the very midst of the dangers at New Orleans, General Wilkinson was brought before a court there for having neglected promptly to obey a writ of *habeas corpus*.—(See Annual Register for 1807, page 84.)

12. I call the attention of the court for a moment to the discussion in Congress, in relation to the action of General Jackson, in 1815, at New Orleans. It will be remembered that notwithstanding flagrant war was blazing around New Orleans when the general declared martial law, yet it was held that he had violated the sanctity of the courts, and he was fined accordingly. For a full record of the law in the case, see 3 Martin's Lou. Rep., O. S., 520.

In 1842 a bill was introduced into Congress to reimburse him for the fine. The debate was very able and thorough.

James Buchanan, then a member of Congress, spoke in its favor, and no one will doubt his willingness to put the conduct of Jackson on the most favorable ground possible. I quote from his speech:

"It had never been contended on this floor that a military commander 'possessed the power under the Constitution of the United States to declare 'martial law. No such principle had ever been asserted on this (the 'Democratic) side of the House. He had then expressly declared (and 'the published report of the debate, which he had recently examined 'would justify him in this assertion) that we did not contend, strictly speaking, that General Jackson had any constitutional right to declare martial 'law at New Orleans; but that, as this exercise of power was the only 'means of saving the city from capture by the enemy, he stood amply 'justified before his country for the act. We placed the argument not upon 'the ground of strict constitutional right, but of such an overruling necessity as left General Jackson no alternative between the establishment of 'martial law, or the sacrifice of New Orleans to the rapine and lust of the 'British soldiery. On this ground Mr. B. had planted himself firmly at 'the last session of Congress; and here he intended to remain."—*Benton's Abridgment of Debates*, vol. 14, page 628.

All the leading members took the same ground. It was not attempted to justify, but to palliate and excuse the conduct of Jackson.

13. I call attention next to the opinions of our own courts in regard to martial law and the suspension of the writ of *habeas corpus*, and first read from the opinion of Chief Justice Marshall, 4 Cranch, page 101:

"If at any time the public safety should require the suspension of the 'powers vested in the courts of the United States, *it is for the legislature 'to say so.* The question depends on political considerations on which '*the legislature is to decide.* Until the legislative will be expressed the 'court can only see its duty and obey the laws."

I cite also the opinion of the late Chief Justice in *ex parte* Merryman, 9 American Law Register, page 596, in which it was decided that the legislative authority alone could suspend the writ of *habeas corpus*. This decision was rendered in 1862, in the Maryland circuit.

I shall conclude these citations from our own judicial history, by reading a few paragraphs from the opinion of Mr. Justice Woodbury, in Luther v. Borden, 7 Howard, page 62. The passage I shall cite loses none of its force from the fact that it is a part of a dissenting opinion—for the principles involved in it were not strictly in issue, nor were they denied by the court. After stating his positions at length, the learned justice says:

"For convincing reasons like these, in every country which makes any 'claim to political or civil liberty, 'martial law' as here attempted and as 'once practiced in England against her own people has been expressly 'forbidden there for near two centuries, as well as by the principles of every 'other free constitutional government.—(1 Hallam's Const. History, 420.) 'And it would be not a little extraordinary, if the spirit of our institutions, 'both state and national, was not much stronger than in England against the 'unlimited exercise of martial law over a whole people, whether attempted 'by any chief magistrate or even by a legislature."

* * * * * * *

"My impression is that a state of war, whether foreign or domestic, 'may exist, in the great perils of which it is competent under its rights 'and on principles of national law for a commanding officer of troops under 'the controlling government to extend certain rights of war, not only over 'his camp, but its environs, and the near field of his military operations. '(6 American Archives, 186) But no further nor wider. (Johnson v. Davis 'et al., 3 Martin, 530, 551.) On this rested the justification of one of the 'great commanders of this country and of the age in a transaction so well 'known at New Orleans. But in civil strife they are not to extend beyond 'the place where insurrection exists, (3 Martin, 551,) nor to portions of 'the state remote from the scene of military operations, nor after the re-'sistance is over, nor to persons not connected with it, (Grant v. Gould 'et al., 2 Hen. Bl., 69,) nor even within the scene can they extend to 'the person or property of citizens against whom no probable cause exists 'which may justify it, (Sutton v. Johnston, 1 D. & E., 549.)"—*Ibid*, p. 83.

14. I cannot leave this branch of my argument without fortifying my position by the authority of two of the greatest names on the roll of British jurists. To enable me to do this, I call attention to the celebrated trial of the Rev. John Smith, missionary at Demarara, in British Guiana. In the year 1823 a rebellion broke out in Demarara, extending over some fifty plantations. The governor of the district immediately declared martial law. A number of the insurgents were killed and the rebellion was crushed. It was alleged that the Rev. John Smith, a missionary, sent out by the London Missionary Society, had been an aider and abettor of the rebellion. A court-martial was appointed, and in order to give it the semblance of civil law the governor-general appointed the chief justice of the district as a staff officer, and then detailed him as president of the court to try the accused. All the other members of the court were military men, and he was made a military officer for the special occasion. Missionary Smith was tried, found guilty, and sentenced to be hung. The proceedings came to the notice of Parliament, and were made the subject of inquiry and debate. Smith died in prison before the day of execution, but the

trial gave rise to one of the ablest debates of the century, in which the principles involved in the cause now before this court were fully discussed. Lord Brougham and Sir James Mackintosh were among the speakers. In the course of his speech Lord Brougham said :

" No such thing as martial law is recognized in Great Britain, and courts ' founded on proclamations of martial law are wholly unknown. Suppose ' I am ready to admit that, on the pressure of a great necessity, such as ' invasion or rebellion, when there is no time for the slow and cumbrous ' proceedings of the civil law, a proclamation may justifiably be issued for ' excluding the ordinary tribunals and directing that offences should be ' tried by a military court, such a proceeding might be justified by neces- ' sity, but it could rest on that alone. Created by necessity, necessity ' must limit its continuance. It would be the worst of all conceivable ' grievances, it would be a calamity unspeakable, if the whole law and ' constitution of England were suspended one hour longer than the most ' imperious necessity demanded. I know that the proclamation of mar- ' tial law renders every man liable to be treated as a soldier. *But the ' instant the necessity ceases, that instant the state of soldiership ought to ' cease, and the rights, with the relations of civil life, to be restored.*"

The speech of Sir James Mackintosh, who was perhaps the very first English jurist of his day, is in itself a magazine of legal learning, and treats so fully and exhaustively the subject of martial law and military tribunals that I shall take the liberty of quoting a lengthy passage. I do this with less hesitation because I have found no argument so full and complete, and no authority more perfectly applicable to the cause before this court. I quote from the London edition, 1851, Mackintosh's Miscellaneous Works, p. 734:

" Sir, the impregnable speech of my learned friend [Lord Brougham] ' has left me little if anything to say. The only principle on which the ' law of England tolerates what is called ' martial law ' is necessity. Its ' introduction can be justified only by necessity; its continuance requires ' precisely the same justification of necessity, and if it survives the ne- ' cessity, in which alone it rests, for a single minute, it becomes instantly a ' mere exercise of lawless violence. When foreign invasion or civil war ' renders it impossible for courts of law to sit, or to enforce the execution ' of their judgments, it becomes necessary to find some rude substitute for ' them, and to employ for that purpose the military, which is the only re- ' maining force in the community."

I desire to call particular attention to the next paragraph, which lays down the chief condition that can justify martial law and also marks the boundary between martial and civil law.

" While the laws are silenced *by the noise of arms*, the rulers of the armed ' force must punish, as equitably as they can, those crimes which threaten ' their own safety and that of society, but no longer; every moment be- ' yond is usurpation. *As soon as the laws can act, every other mode of ' punishing supposed crimes is itself an enormous crime.* If argument be ' not enough on this subject—if, indeed, the mere statement be not the ' evidence of its own truth—I appeal to the highest and most venerable ' authority known to our law."

He proceeds to quote Sir Matthew Hale on martial law and cites the case of the Earl of Lancaster, to which I have already referred, and then declares :

" No other doctrine has ever been maintained in this country since the

'solemn parliamentary condemnation of the usurpations of Charles I., which 'he was himself compelled to sanction in the Petition of Right. In none 'of the revolutions or rebellions which have since occurred has martial 'law been exercised, however much, in some of them, the necessity might 'seem to exist. Even in those most deplorable of all commotions which 'tore Ireland in pieces in the last years of the eighteenth century, in the 'midst of ferocious revolt and cruel punishment, at the very moment of 'legalizing these martial jurisdictions in 1799, the very Irish statute, which 'was passed for that purpose, did homage to the ancient and fundamental 'principles of the law in the very act of departing from them. The Irish 'statute, 39 George III., chap. 3, after reciting 'that martial law had been 'successfully exercised to the restoration of peace, so far as to permit the 'course of the common law partially to take place, but that the rebellion 'continued to rage in considerable parts of the kingdom, whereby it has 'become necessary for Parliament to interpose,' goes on to enable the 'Lord Lieutenant 'to punish rebels by courts martial.' This statute is the 'most positive declaration that *where the common law can be exercised in 'some parts of the country, martial law cannot be established in others, though 'rebellion actually prevails in those others, without an extraordinary inter-'position of the supreme legislative authority itself.*"

"I have already quoted from Sir Matthew Hale his position respecting 'the two-fold operation of martial law, as it affects the army of the power 'which exercises it, and as it acts against the army of the enemy. That 'great judge, happily unused to standing armies, and reasonably preju-'diced against military jurisdiction, does not pursue his distinction through 'all its consequences, and asigns a ground for the whole, which will sup-'port only one of its parts. 'The necessity of order and discipline in an 'army' is, according to him, the reason why the law tolerates this de-'parture from its most valuable rules; but this necessity only justifies the 'exercise of martial law over the army of our own state. One part of it has 'since been annually taken out of the common law and provided for by 'the mutiny act, which subjects the military offences of soldiers only to 'punishment by military courts even in time of peace. Hence we may 'be said annually to legalize military law; which, however, differs essen-'tially from martial law, in being confined to offences against military dis-'cipline, and in not extending to any persons but those who are members 'of the army. Martial law exercised against enemies or rebels cannot 'depend on the same principle, for it is certainly not intended to enforce 'or preserve discipline among them. It seems to me to be only a more 'regular and convenient mode of exercising the right to kill in war—a right 'originating in self-defence, and limited to those cases where such killing 'is necessary as the means of insuring that end. Martial law put in force 'against rebels can only be excused as a mode of more deliberately and equi-'table selecting the persons from whom quarter ought to be withheld in a 'case where all have forfeited their claim to it. It is nothing more than a sort 'of better regulated decimation, founded upon choice, instead of chance, 'in order to provide for the safety of the conquerors, without the horrors 'of undistinguished slaughter; it is justifiable only where it is an act of 'mercy: Thus the matter stands by the law of nations. But by the law 'of England it cannot be exercised except where the jurisdiction of courts 'of justice is interrupted by violence.

"Did this necessity exist at Demarara on the 13th of October, 1823? 'Was it on that day impossible for the courts of law to try offences? It

'is clear that, if the case be tried by the law of England, and unless an 'affirmative answer can be given to these questions of fact, the court-mar- 'tial had no legal power to try Mr. Smith."

After presenting arguments to show that a declaration of martial law was not necessary, the learned jurist continues :

"For six weeks, then, before the court-martial was assembled, and for 'twelve weeks before that court pronounced sentence of death on Mr. 'Smith, all hostility had ceased, no necessity for their existence can be 'pretended, and every act which they did was an open and deliberate 'defiance of the law of England.

"Where, then, are we to look for any color of law in these proceed- 'ings ? Do they derive it from the Dutch law ? I have diligently exam- 'ined the Roman law, which is the foundation of that system, and the 'writings of those most eminent jurists who have contributed so much to 'the reputation of Holland. I can find in them no trace of any such prin- 'ciple as martial law. Military law, indeed, is clearly defined ; and pro- 'vision is made for the punishment by military judges of the purely mili- 'tary offences of soldiers. But to any power of extending military juris- 'diction over those who are not soldiers, there is not an allusion. I will 'not furnish a subject for the pleasantries of my right honorable friend, 'or tempt him into a repetition of his former innumerable blunders, by 'naming the greatest of these jurists, (Bynkershoek,) lest his date, his 'occupation, and his rank might be again mistaken ; and the venerable 'president of the supreme court of Holland might be once more called a 'a 'clerk of the States-General.' '*Persecutio militis*,' says that learned 'person, '*pertinet ad judicem militarem quando delictum sit militare, et ad 'judicem communem quando delictum sit commune.*'

"Far from supposing it to be possible, that those who were not soldiers 'could ever be triable by military courts for crimes not military, he ex- 'pressly declares the law and practice of the United Provinces to be, that 'even soldiers are amenable, for ordinary offences against society, to the 'court of Holland and Friesland, of which he was long the chief. The 'law of Holland, therefore, does not justify this trial by martial law. 'Nothing remains but some law of the colony itself. Where is it ? It is 'not alleged or alluded to in any part of this trial. We have heard noth- 'ing of it this evening. So unwilling was I to believe that this court- 'martial would dare to act without some pretence of legal authority, that 'I suspected an authority for martial law would be dug out of some dark 'corner of a Guiana ordinance. I knew it was neither in the law of Eng- 'land nor in that of Holland ; and I now believe that it does not exist even 'in the law of Demarara. The silence of those who are interested in 'producing it, is not my only reason for this belief. I happen to have seen 'the instructions of the States-General to their governor of Demarara, in 'November, 1792, probably the last ever issued to such an officer by that 'illustrious and memorable assembly. They speak at large of councils of 'war, both for consultation and for judicature. They authorize these 'councils to try the military offences of soldiers ; and therefore, by an 'inference which is stronger than silence, authorize us to conclude that 'the governor had no power to subject those who were not soldiers to their 'authority. The result, then, is, that the law of Holland does not allow 'what is called 'martial law' in any case ; and that the law of England 'does not allow it without a necessity, which did not exist in the case of 'Mr. Smith. If, then, martial law is not to be justified by the law of

'England, or by the law of Holland, or by the law of Demarara, what is 'there to hinder me from affirming that the members of this pretended 'court had no more right to try Mr. Smith than any other fifteen men on 'the face of the earth—that their acts were nullities, and their meeting a 'conspiracy—that their sentence was a direction to commit a crime—that 'if it had been obeyed, it would not have been an execution but a murder, 'and that they, and all other parties engaged in it, must have answered 'for it with their lives."

May it please the court, many more such precedents as I have already cited, might be added to the list, but it is unnecessary. They all teach the same lesson.

They enable us to trace from its far off source, the progress and development of Anglo-Saxon liberty; its innumerable conflicts with irresponsible power; its victories, dearly bought, but always won—victories which have crowned with immortal honors the institutions of England, and left their indelible impress npon the Anglo-Saxon mind. These principles our fathers brought with them to the new world, and guarded with sleepless vigilance and religious devotion. In its darkest hour of trial, during the late rebellion, the republic did not forget them. So completely have they been impressed on the minds of American lawyers; so thoroughly have they been ingrained into the very fibre of American character, that notwithstanding the citizens of eleven states went off into wild rebellion, broke their oaths of allegiance to the Constitution, and levied war against their country, yet with all their crimes upon them, there was still in the minds of those men, during all the struggle, so deep and enduring an impression on this great subject, that even during their rebellion, the courts of the Southern states adjudicated causes like the one now before you, in favor of the civil law and against courts-martial established under military authority for the trial of citizens. In Texas, Mississippi, Virginia, and other insurgent states, by the order of the rebel President, the writ of *habeas corpus* was suspended, martial law was declared, and provost marshals were appointed to administer military authority. But when civilians, arrested by military authority, petitioned for release by writ of *habeas corpus*, in every case, save one, the writ was granted, and it was decided that there could be no suspension of the writ or declaration of martial law by the executive, or by any other than the supreme legislative authority.

The men who once stood high in the list of American lawyers, such as Alexander H. Stephens, Albert Pike, and Gen. Houston, wrote letters and made speeches against the practice until it was abandoned. In the year 1862 the commander-in-chief of the rebel armies, compelled, by the force of public sentiment, published a general order, disclaiming any right or claim of right to establish martial law or suspend the writ of *habeas corpus* without the authority of the rebel congress.

I said there was one exceptional instance. A judge of the supreme court of Texas, in the first excitement of the rebellion, refused to issue a writ of *habeas corpus* to release from military arrest a citizen charged with disloyalty to the rebel government. He wrote his opinion and delivered it; but he was so much agitated when he found that he stood alone among judges on that great question of human rights that he went to the book of records, in which his opinion was recorded, and with his own hand plucked the leaves from the volume and destroyed them. He also destroyed the original copy that it might never be put in type; and having destroyed everything but the remembrance of it, ended his life by suicide. I believe

he alone among rebel judges, ventured to recognize martial law, declared without legislative authority.

The spirit of liberty and law is well embodied in this one sentence of Delolme (Vol. I., p. 455): "The arbitrary discretion of any man is 'the law of tyrants—it is always unknown, it is different in different men, 'it is casual, and depends upon constitution, temper, and passion; in the 'best it is oftentimes caprice, in the worst it is every vice, folly, and pas-'sion to which human nature is liable."

And yet, if this military commission could legally try these petitioners, its authority rested only upon the will of a single man. If it had the right to try these petitioners, it had the right to try any civilian in the United States; it had the right to try Your Honors, for you are civilians. The learned gentlemen tell us that necessity justifies martial law. But what is the nature of that necessity. If, at this moment, Lee, with his rebel army at one end of Pennsylvania avenue, and Grant, with the army of the Union at the other, with hostile banners and roaring guns, were approaching this Capitol, the sacred seat of justice and law, I have no doubt they would expel Your Honors from the bench, and the Senate and House of Representatives from their halls. The jurisdiction of battle would supersede the jurisdiction of law. This court would be silenced by the thunders of war.

If an earthquake should shake the City of Washington, and tumble this Capitol in ruins about us, it would drive Your Honors from the bench, and for the time, volcanic law would supersede the Constitution.

If the supreme court of Herculaneum or Pompeii had been in session when the fiery ruin overwhelmed those cities, its authority would have been suddenly usurped and overthrown, but I question the propriety of calling that *law*, which, in its very nature, is a destruction or suspension of all law.

From this review of the history and character of martial law I am warranted by the uniform precedents of English law for many centuries; by the uniform practice of our fathers during the colonial and revolutionary periods; by the unanimous decisions of our courts, and by the teachings of our statesmen, to conclude—

1. *That the Executive has no authority to suspend the writ of habeas corpus, or to declare or administer martial law; much less has any military subordinate of the Executive such authority; but these high functions belong exclusively to the supreme legislative authority of the nation.*

2. *That if, in the presence of great and sudden danger, and under the pressure of overwhelming necessity, the chief Executive should, without legislative warrant, suspend the writ of habeas corpus or declare martial law, he must not look to the courts for justification, but to the legislature for indemnification.*

3. *That no such necessity can be pleaded to justify the trial of a civilian by a military tribunal when the legally authorized civil courts are open and unobstructed.*

It will be observed that in this discussion I have not alluded to the legal status of citizens of those states which were declared, both by the legislative and executive departments of the government, to be in rebellion against the United States.

It has been fully settled, not only by the other coördinate branches of the government, but by this court, that those states constituted a belligerent government *de facto*, against which the federal government might proceed

with all the appliances of war, and might extend absolute military jurisdiction over every foot of rebel territory.

But the military jurisdiction thus conferred by the government does not extend beyond the territory of the rebellious states, except where the tide of war actually sweeps beyond those limits and by its flaming presence makes it impossible for the civil courts to exercise their functions.

The case before Your Honors comes under neither of these conditions, hence, the laws of war are inapplicable to it.

The military commission, under our government, is of recent origin. It was instituted by Gen. Scott, in Mexico, to enable him, in the absence of any civil authority, to punish Mexican and American citizens for offences not provided for in the rules and articles of war The purpose and character of a military commission may be seen from his celebrated order No. 20, published at Tampico. It was no tribunal with authority to punish, but merely a committee appointed to examine an offender and advise the commanding general what punishment to inflict. It is a rude substitute for a court of justice, in the absence of civil law.

Even our own military authorities, who have given so much prominence to these commissions, do not claim for them the character of tribunals established by law.

In his "Digest of Opinions" for 1866, the Judge Advocate General says, page 131:

"Military commissions have grown out of the necessities of the service, 'but their powers have not been defined nor their mode of proceeding 'regulated by any statute law."

Again, p. 133:

"In a military department the military commission is a substitute for 'the ordinary state or United States court, *when the latter is closed by the 'exigencies of war*, or is without the jurisdiction of the offence committed."

The only ground on which the learned counsel attempt to establish the authority of the military commission to try the petitioners, is that of the necessity of the case. I answer there was no such necessity. Neither the Constitution nor Congress recognized it. I point to the Constitution as an arsenal, stored with ample powers to meet every emergency of national life. No higher test of its completeness can be imagined than has been afforded by the great rebellion, which dissolved the municipal governments of eleven states, and consolidated them into a gigantic traitorous government *de facto*, inspired with the desperate purpose of destroying the government of the United States.

From the beginning of the rebellion to its close, Congress, by its legislation, kept pace with the necessities of the nation. In sixteen carefully considered laws, the national legislature undertook to provide for every contingency, and arm the executive at every point with the solemn sanction of law. Observe how perfectly the case of the petitioners was covered by the provisions of law.

The first charge against them was "conspiracy against the government of the United States."

In the act approved July 31, 1861, that very crime was fully defined, and placed within the jurisdiction of the district and circuit courts of the United States.

Charge 2: "Affording aid and comfort to the rebels against the authority of the United States."

In the act approved July 17, 1862, this crime is set forth in the very

words of the charge, and it is provided that "on conviction before any 'court of the United States, having jurisdiction thereof, the offender shall 'be punished by a fine not exceeding ten thousand dollars, and by impris-'onment not less than six months, nor exceeding five years."

Charge 3: "Inciting insurrection."

On pages 191 to 202, Brightly's Digest, Vol. 2, there is compiled from ten separate acts, a chapter of sixty-four sections on *insurrection*, setting forth in the fullest manner possible, every mode by which citizens may aid in insurrection, and providing for their trial and punishment by the regularly ordained courts of the United States.

Charge 4: "Disloyal practices."

The meaning of this charge can only be found in the specifications under it, which consists in discouraging enlistments and making preparations to resist a draft designed to increase the army of the United States. These offences are fully defined in the thirty-third section of the act of March 3, 1863, "for enrolling and calling out the national forces," and in the twelfth section of the act of February 24, 1864, amendatory thereof. The provost marshal is authorized to arrest such offenders, but he must deliver them over for trial to the civil authorities. Their trial and punishment are expressly placed in the jurisdiction of the district and circuit courts of the United States.

Charge 5: "Violation of the laws of war;" which, according to the specifications, consisted of an attempt, through a secret organization, to give aid and comfort to rebels. This crime is amply provided for in the laws referred to in relation to the second charge.

But Congress did far more than to provide for a case like this. Throughout the eleven rebellious states it clothed the military department with supreme power and authority. State constitutions and laws, the decrees and edicts of courts were all superseded by the laws of war.

Even in states not in rebellion, but where treason had a foot-hold, and hostile collisions were likely to occur, Congress authorized the suspension of the writ of *habeas corpus*, and directed the army to keep the peace.

But Congress went further still, and authorized the President, during the rebellion, whenever, in his judgment, the public safety should require it, to suspend the privilege, writ of *habeas corpus*, in any state or territory of the United States, and order the arrest of any persons whom he might believe dangerous to the safety of the republic, and hold them till the civil authorities could examine into the nature of their crimes. But this act of March 3, 1863, gave no authority to try the person by any military tribunal, and it commanded judges of the circuit and districts courts of the United States, whenever the grand jury had adjourned its sessions, and found no indictment against such persons, to order their immediate discharge from arrest. All these capacious powers were conferred upon the military department, but there is no law on the Statute Book in which the tribunal that tried the petitioners can find the least recognition.

I wish to call the attention of Your Honors to a circumstance showing the sentiment of the House of Representatives of the Thirty-Eighth Congress on this subject. Near the close of the last Congress, when the miscellaneous appropriation bill, which authorized the disbursement of several millions of dollars for the civil expenditures of the government, was under discussion, the House of Representatives having observed, with alarm, the growing tendency to break down the barriers of law, and desir-

ing to protect the rights of citizens as well as to preserve the Union, added to the appropriation bill the following section :

"*And be it further enacted*, That no person shall be tried by court-martial or military commission in any state or territory where the courts of the United States are open, except persons actually mustered or commissioned or appointed in the military or naval service of the United States, or rebel enemies charged with being spies."

It was debated at length in the Senate, and though almost every Senator acknowledged its justice, yet, as the nation was then in the very mid-whirl and fury of the war, it was feared that the Executive might thereby be crippled, and the section was stricken out. The bill came back to the House ; conferences were held upon it, and finally, in the last hour of the session, the House deliberately determined that, important as the bill was to the interests of the country, they preferred it should not become a law if that section were stricken out. I beg leave to read some passages from the remarks of one of the noblest, ablest, and most patriotic men that have honored this nation during the war—that great man so lately taken from us, Henry Winter Davis, of Maryland. After reporting the provisions of the bill agreed upon by the committee of conference, he said :

"Under these circumstances it remained for a majority of the House committee to determine between the great result of losing an important appropriation bill, or, after having raised a question of this magnitude touching so nearly the right of every citizen to his personal liberty and the very endurance of republican institutions, and to insure its consideration fastened it on an appropriation bill, to allow it to be stricken out of the bill as a matter of secondary importance. The committee thought that their duty to their constituents, to the House, and to themselves, would not allow them to provide for any pecuniary appropriations at the expense of so grave a reflection upon the fundamental principles of the government."

* * * * * * * *

"The practice of the government has introduced into the jurisprudence of the United States, principles unknown to the laws of the United States, loosely described under the general term of '*the rules and usages of war*,' and new crimes, defined by no law, called 'military offences ;' and without the authority of any statute, constitutional or unconstitutional, pointing these laws—confined by the usage of the world to enemies in enemies' territory—against our own citizens in our own territory, the government has repeatedly deprived many citizens of the United States of their liberty, has condemned many to death, who have only been redeemed from that extreme penalty by the kindness of the President's heart, aided doubtless by the serious scruples he cannot but feel touching the legality of the judgment that assigned them to death.

"There have been many cases in which judgments of confinement in the penitentiary have been inflicted for acts not punishable, either under the usages of war, or under any statute of the United States, by any military tribunal ; crimes for which the laws of the United States prescribe the punishment have been visited with other and severer punishments by military tribunals ; violations of contract with the government, real or imputed, have been construed by these tribunals into frauds, and punished illegally as crimes ; excessive bail has been demanded, and when furnished impudently refused ; and the attempt of Congress to discriminate between crimes committed by persons in the military forces and

'citizens not in those forces, has been annulled, and the very offences it 'specifically required to be tried before the courts of the United States have 'been tried before military tribunals dependent upon the will of the Presi-'dent alone."

* * * * * * * *

"The committee remember that such things are inconsistent with the 'endurance of republican government. The party which tolerates or de-'fends them must destroy itself or the republic. They felt they had 'reached a point at which a vote must be cast which may break up politi-'cal parties, or, if it do not, will break up or save a great republican gov-'ernment. Before these alternatives they could not hesitate. They thought 'it best, now, at this time, to leave this law standing as a broken dike in 'the midst of the rising flood of lawless power around us, to show to this 'generation how high that flood of lawless power has risen in only three 'years of civil war, as a warning to those who are to come after us, as an 'awakening to those who are now with us.

"They have, therefore, come to the determination, so far as the consti-'tutional privileges and prerogatives of this House will enable them to 'accomplish the result, that this bill shall not become a law if these words 'do not stand as a part of it—the affirmation by the representatives of the 'states and of the people of the inalienable birthright of every American 'citizen · and on that question they appeal from the judgment of the 'Senate to the judgment of the American people."—*Cong'l Globe*, 2nd sess., 38th Cong., Part 2d. p. 1,422.

The appeal was taken; the bill failed; and the record of its failure is an emphatic declaration that the House of Representatives have never consented to the establishment of any tribunals except those authorized by the Constitution of the United States and the laws of Congress.

There was one point suggested rather than insisted upon by the opposing counsel, which it requires but little more than a statement to answer. On page 15 of their brief, the learned gentlemen say that if the military tribunal had no jurisdiction, the petitioners may be held as prisoners captured in war, and handed over by the military to the civil authorities, to be tried for their crimes under the acts of Congress, and before the courts of the United States.

The answer to this, is that the petitioners were never enlisted, commissioned, or mustered in the service of the confederacy; nor had they been within the rebel lines, or within any theater of active military operations; nor had they been in any way recognized by the rebel authorities as in their service. They could not have been exchanged as prisoners of war; nor, if all the charges against them were true, could they be brought under the legal definition of spies. There appears to be no ground whatever for calling them prisoners of war. The suggestion of our opponents that the petitioners should be handed over to the civil authorities for trial, is precisely what they petitioned for, and what, according to the laws of Congress, should have been done.

We do not ask that they shall be shielded from any lawful punishment, but that they shall not be unlawfully punished, as they now are, by the sentence of a tribunal which had no jurisdiction over either their persons or the subject-matter of the charges.

The only color of authority for such a trial, was found in the President's proclamation of September 24th, 1862, which was substantially annulled

by the *habeas corpus* act of March 3d, 1863, and the subsequent Presidential proclamation of September 15th, 1863.

By these acts, the military authority could only *arrest and hold* disaffected persons till after a session of the United States District Court.

May it please the court, I have thus reviewed the principles upon which our government was founded; the practice of the fathers who founded it; and the almost unanimous sentiment of its presidents, congresses, and courts.

I have shown that Congress undertook to provide for all the necessities which the rebellion imposed upon the nation. That it provided for the trial and pointed out expressly the mode of punishment for every crime imputed to the petitioners. There is not a single charge or specification in the petition before you, not a single allegation of crime, that is not expressly provided for in the laws of the United States, and the courts are designated before which offenders may be tried. These courts were open during the trial and had never been disturbed by the rebellion. The military commission on the tenth day of its session withdrew from the chamber where it had been sitting, that the circuit court of the United States might hold its regular term in its own building. For the next ten days the commission occupied, by permission, the chamber of the supreme court of the state of Indiana, but removed to another hall when the regular term of that court began. This military commission sat at a place two hundred miles beyond the sound of a hostile gun, in a state that had never felt the touch of martial law, that had never been defiled by the tread of a hostile rebel foot, except on a remote border, and then but for a day. That state, with all its laws and courts, with all its securities of personal rights and privileges, is declared by the opposing counsel to have been completely and absolutely under the control of martial law; that not only the constitution and laws of Indiana, but the Constitution and laws of the United States where wholly suspended, so that no writ, injunction, prohibition, or mandate of any district or circuit court of the United States, or even of this august tribunal, was of any binding force or authority whatever except by the permission and at the pleasure of a military commander.

Such a doctrine, may it please the court, is too monstrous to be tolerated for a moment; and I trust and believe that when this cause shall have been heard and considered it will receive its just and final condemnation. Your decision will mark an era in American history. The just and final settlement of this great question will take a high place among the great achievements which have immortalized this decade. It will establish forever this truth, of inestimable value to us and to mankind, that a republic can wield the vast enginery of war without breaking down the safeguards of liberty; can suppress insurrection and put down rebellion, however formidable, without destroying the bulwarks of law; can, by the might of its armed millions preserve and defend both nationality and liberty. Victories on the field were of priceless value, for they plucked the life of the republic out of the hands of its enemies, but

> "Peace hath her victories
> No less renown'd than war,"

and if the protection of law shall, by your decision, be extended over every acre of our peaceful territory, you will have rendered the great decision of the century.

When Pericles had made Greece immortal in arts and arms, in liberty and law, he invoked the genius of Phidias to devise a monument which

should symbolize the beauty and glory of Athens. That artist selected for his theme the tutelar divinity of Athens, the Jove-born goddess, protectress of arts and arms, of industry and law, who typified the Greek conception of composed, majestic, unrelenting force. He erected on the heights of the Acropolis a colossal statue of Minerva, armed with spear and helmet, which towered in awful majesty above the surrounding temples of the gods. Sailors on far-off ships beheld the crest and spear of the goddess and bowed with reverent awe. To every Greek she was the symbol of power and glory. But the Acropolis, with its temples and statues is now a heap of ruins. The visible gods have vanished in the clearer light of modern civilization. We cannot restore the decayed emblems of ancient Greece, but it is in your power, O Judges, to erect in this citadel of our liberties a monument more lasting than brass; invisible indeed to the eye of flesh, but visible to the eye of the spirit as the awful form and figure of Justice, crowning and adorning the republic; rising above the storms of political strife, above the din of battle, above the earthquake shock of rebellion; seen from afar and hailed as protector by the oppressed of all nations; dispensing equal blessings, and covering with the protecting shield of law the weakest, the humblest, the meanest, and, until declared by solemn law unworthy of protection, the guiltiest of its citizens.

NOTE.—The following is the order of the Supreme Court in the above cases, as given on the last day of its session:

SUPREME COURT OF THE UNITED STATES.—No. 350.—*December Term*, 1865.

Ex-parte in the matter of Lambdin P. Milligan, Petitioner. } On a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Indiana.

Mr. Chief Justice CHASE announced the order of the Court.

The following order is directed by a majority of the court to be entered in this cause, and the like order will be entered in No. 365, ex-parte in the matter of William A. Bowles, petitioner, and in No. 376, ex-parte in the matter of Stephen Horsey, petitioner.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the District of Indiana, and on the points and questions on which the said judges of the circuit court were opposed in opinion, and which were certified in this court for its opinion, agreeably to the act of Congress in such case made and provided; and was argued by counsel. On consideration whereof this court is of opinion—

I. That on the facts as stated in said petition and exhibits, a writ of habeas corpus ought to be issued according to the prayer of said petition.

II. That on the facts stated in the said petition and exhibits, the said Lambdin P. Milligan ought to be discharged from custody as in said petition is prayed, and according to the act of Congress, passed 3d March, 1863, entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases."

III. That on the facts stated in said petition and exhibits, the military commission mentioned therein had no jurisdiction legally to try and sentence said Lambdin P. Milligan in the manner and form as in said petition and exhibits are stated.

And it is therefore now here ordered and adjudged by this court that it be so certified to the said circuit court.

The Chief Justice also announced that the opinion of the court in these cases will be read at the next term, when such of the dissenting judges as see fit to do so, will state their grounds of dissent.

1825

1527

ARGUMENT

OF

BENJAMIN F. BUTLER,

IN BEHALF OF THE GOVERNMENT,

IN THE CASES OF

LAMBDIN P. MILLIGAN AND OTHERS,

PETITIONERS FOR A WRIT OF HABEAS CORPUS,

BEFORE THE

SUPREME COURT OF THE UNITED STATES,

AT WASHINGTON, D.C.,

December Term, 1865.

LOWELL:
HILDRETH & HUNT, PRINTERS, MUSEUM BUILDING, MERRIMACK ST.
1866.

1629

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NOTE.

LAMBDIN P. MILLIGAN of Indiana had been arrested by the order of Maj.-General Hovey, in the autumn of 1864, for treasonable practice, tried by a Military Commission, convicted, and sentenced to death. His sentence had been approved by the President, but was afterwards commuted to imprisonment to hard labor. *Milligan* thereupon brought his writ of *habeas corpus* asking to be relieved from his imprisonment, alleging that the Military Commission had no jurisdiction. Upon the hearing the Circuit Judges divided in opinion upon the following questions, which were certified up to the Supreme Court at Washington.

1. On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued according to the prayer of said petition?

2. On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody, as in said petition prayed?

3. Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?

At the argument in March, 1865, the Government was represented by MR. BAKER of Massachusetts, MR. STANBERRY of Ohio, and the ATTORNEY GENERAL, JUDGE MCDONALD of Indiana, GEN. GARFIELD of Ohio, JUDGE BLACK of Pennsylvania, and MR. DAVID DUDLEY FIELD of New York. The magnitude of the questions involving the war powers of the Government and the jurisdiction of Military Commissions justified the array of Counsel, and the length of the arguments. The offence of which Milligan was found guilty will sufficiently appear in the argument. There were several other cases depending upon the decision.

1831

ARGUMENT.

THE EXACT QUESTION.

MR. BUTLER. MAY IT PLEASE YOUR HONORS: Perhaps I can at first in no better way aid the Court in this discussion, than by bringing succinctly to your minds the exact state of facts set forth in the record and the precise questions raised by it. These facts are all in the relators' petition and the exhibits thereto attached, and must, for the purposes of this hearing, be taken to be indisputably true; at least so far as against them. They are estopped to deny their own showing. Yet if I apprehend the case at the bar at all, a large portion of the argument on behalf of the relators, has proceeded on an assumption which is itself a denial of the facts stated upon the record. As an example, the fact that military operations were being carried on in Indiana, at the places where these occurrences are said to have taken place, is a question that the gentlemen on the other side desire to argue, and desire farther that the Court should take judicial notice that the fact was not as stated by the record. Am I not right? How does the record state this fact? I do not trust myself to quote from memory, but will read from the words of the record:

"These acts were committed within the district of Indiana and within the military lines of the United States, and within the theatre of military operations which had been and constantly was threatened with invasion;"

Therefore what your Honors are called upon to-day to decide, and we in discharge of our duty must discuss, is, what law is applicable to a theatre of military operations, within the lines of an army, in a State which has been and constantly is threatened with invasion.

IS THE QUESTION ONE OF LAW OR OF FACT?

Now, first of all, I desire to have it settled in the mind of my brother, who is to close the case for the relators, [Mr. Field] and in the judgment of the Court as the very foundation of the argument, whether these allegations of the record are to be taken as true, or some knowledge of some member of the Court, or some facts ascertained in some way of which I know nothing is to be taken, as the state of facts upon which this argument shall proceed. Is the record in this behalf to be contradicted, or shall it stand as the true theory of fact?

These questions become exceedingly important, because I may well concede, and for the benefit of my learned brothers I do freely agree, if at the time of these occurrences there were no military operations in Indiana, if there was no army there, if there was no necessity of armed forces there, if there was no need of a Military Commission there, if there was nothing there on which the War Power of the United States could attach itself, then this Commission had no jurisdiction to deal with the relators, and the question proposed may as well at once be answered in the negative. Therefore before we waste more precious time, let us see what is the state of facts brought before the Court by the record, because whatever question may have divided the learned Judges in the Court

below, we here at the bar are divided upon a vital question of fact, *toto coelo*. There can be no agreement between us on this point, no stipulation in aid of the record. I wish, therefore, that my brethren would say frankly, whether they rest their case upon the statement so often made by them to the Court, that there were no military operations in Indiana, no military lines, no armed force having full power to enforce its authority according to the judgment of the Commander-in-Chief, to wit, the President of the United States; because, if so, I will agree that the questions be answered in the negative, so far as this military tribunal and its jurisdiction are concerned. But if, on the contrary, the question is to be presented as the record presents it, I insist that much of the argument we have heard on the other side, has been misapplied. Let me, that there be no mistake, again refer to the record.

THE RECORD CONCLUSIVE UPON THE RELATORS.

Every specification upon which these relators were tried by the Military Commission concludes with this averment: "This on or about the first day of November," or the different time and place as applied to the different parties, "at or near Greenbrook township, Randolph County, Indiana," or wherever else it may be, "a state within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

It may be said that these are only the averments of the Government against the relators. These, in fact, are a part of the exhibits of the relators upon which they seek

relief; are an integral part of the case presented by them, and cannot be controlled by the claim, that the Court should take judicial notice of the contrary. Because judicial cognizance of a fact, by the Court, as a matter of public notoriety, or of history, is only a mode of proof of the fact, but no proof can be heard in contradiction of the record in behalf of the relators.

JUDGE BLACK'S PROPOSITION.

I demand, therefore, shall we deal with this question as the record presents it, or shall we treat it as my learned brother who last addressed the Court, [Judge Black], in his somewhat tempestuous opening argument does, who says "that by no possible contingency of war, can any citizen within the United States, and therefore under the protection of the Constitution of the United States, not connected with the military service, either in the army or navy, as regular, volunteer, militia man, or otherwise, be harmed or punished for crime by military authority." That, I understand, is the statement of the learned gentleman, late Attorney General of the United States, who has presented the relators' case for the last three hours, more or less, before you, and I thank him for his frankness. Such being the question, it is of no consequence to inquire what was the state of facts in Indiana, at the time these men were arrested and tried for their admitted guilt. It becomes immaterial as the question is put, and I thank him for it, and repeat his own words as I took them down, "Under no conceivable circumstances can a man not in the army or navy, or connected with them, be tried by any court or tribunal, not ordained and duly established by legislative enactment for any crime or offence whatever."

GUILT ADMITTED FOR THE PURPOSE OF THIS HEARING.

I have said "admitted guilt", for we have ventured to put upon our brief the fact that these petitioners upon oath, when applying to a Court of their own selection for relief, do not even claim that they are not guilty of all of which they have been convicted by the Military Commission of whose jurisdiction they complain. The learned counsel who first opened the case of the relators, [Judge McDonald] explained that this absence of the allegation of innocence on the part of his clients in their petitions under oath, was because it would be "surplusage." There are few good and loyal citizens who—when seeking redress in any court of justice, after having been charged by any respectable authority whatever, with a conspiracy against the Government, with having armed themselves in a secret organization, seeking to introduce the armed enemies of the country into the peaceful community where they live; and with their aid to liberate the prisoners of war held by the military forces of their country in time of war, and joining with these liberated prisoners to attack the soldiers of the United States, and of sending couriers and messengers to the enemy, to make that treasonable correspondence certain—I say there are few good and loyal citizens who would think the denial of such crimes *surplusage*. Whatever their clients may know about it, the counsel certainly have heard of such a thing as coming into court with "clean hands." It would seem to us, and therefore we ventured to put the fact upon our brief, that before coming here, to the highest judicial tribunal of the country, which the relators have sought to destroy, to seek relief, the coun-

sel would have endeavored, if possible, to wash from the hands of their clients, some of the darkness of blackness of treason and rebellion, before they should hold them out imploring that justice might be done to them, when the only true event of justice could be to have the relators executed, as confessedly guilty of enormous crimes, by the sentence of either a civil or military tribunal.

THE FACTS OF RECORD SHOULD HAVE BEEN QUESTIONED, IF AT ALL, IN THE COURT BELOW.

If the facts of raging war on the theatre of these events, which in our judgment are conclusive upon the jurisdiction of the Military Commisson, are not admitted —and they are the ones stated on the record—then we respectfully submit that it is of the greatest importance to the cause, that it be ascertained. If they were drawn in question before the Circuit Court, as they do not seem to have been either by pleading or evidence, but one question could have arisen there, upon which the learned Judges could have divided, and that question was whether the writ of *habeas corpus* could issue, so that upon a return upon it, by whoever held these prisoners in custody, the facts of the allegations in their petitions might have been either traversed, admitted, or otherwise avoided. We are here differing upon a question of fact. If that fact arose below, some measures should have been taken to ascertain it, before the certificate of division of opinion was sent up. But we submit that the very form of question submitted, "whether upon the *facts stated in the petition and exhibits*, the Military Commission had jurisdiction to try the several relators in manner and form as set forth;" —not upon any other facts of which the Court or anybody

else will take notice, or which can be brought to the Court in any other way than upon the petition and exhibits,—is conclusive as to the facts upon which the debate arises. The question is whether upon the fact stated in the petition and exhibit the Commission had jurisdiction; and the great determining fact in this cause, without which we have no standing in court, so far as my judgment instructs me, is, that these acts of Milligan and his felonious associates, took place in the theatre of military operations, within the lines of the army, in a state which had been and then was constantly threatened with invasion. If there was no state of war, if there were no military lines, if there was no theatre of military operations at the several places where these acts are alleged to have been done, if this Court is bound to take judicial notice that these, last described, were the facts which then existed in Indiana. Certainly the learned judges in the Court below, being on the ground, were alike with this Court, bound to take judicial notice of them, and ought to have spread them upon the record, and then they should have certified the question to be, whether under that state of facts so known by them, and spread upon the record, the Military Commission had jurisdiction, and not that they were divided upon a question arising from the state of facts set forth in the relators' petition and exhibits.

THE FACTS ESTABLISHED BY THE CERTIFICATE OF DIVISION OF THE COURT BELOW.

But the Court below have conclusively decided what are the facts upon which this discussion must proceed, by dividing in opinion upon a question arising upon the facts stated, because if they did not divide in opinion upon that

question so arising, then in defiance of the well known practice of this Court, and in defiance of the statute, they have sent up here a mixed question of law and fact, in which the material facts are not found, and which facts are not in dispute between the counsel, and such a certificate of division of opinion, we submit, was not within their power by the statute of 1802; but that matter my learned brother who follows me, [Mr. Stanberry], will discuss at large. With a single farther observation, I shall leave this part of the case.

THE COURT HERE CANNOT TAKE JUDICIAL NOTICE OF ANOTHER STATE OF FACTS.

The whole strength of the opposing argument, which I say cannot be fairly made, that other facts existed in the state of Indiana which ought to determine this case *dehors* the record, is, that this Court is bound to know that the courts of justice in Indiana were open at the time when these occurrences are alleged to have happened. Gentlemen say this Court is bound to take notice of what was the condition of the civil courts there at that time. But such Judicial notice is only one way of proving a fact. Where is the proper allegation that the Courts in Indiana were open, upon the record, upon which your Honors are to judge? Do not your Honors know further, must you not also take judicial notice, how, and by whose protection and by whose permission the courts of Indiana were open? They were open because the strong arm of the military upheld them; solely because by that power these Sons of Liberty and Knights of the American Circle, who would have scattered your courts like sheep without a shepherd, were arrested, staid and punished, as examples to others

in like offending. If you take judicial notice of the one fact, I pray your Honors to take judicial notice of the other. If the soldiers of the United States, by their strong arms and loyal hearts in Indiana, had not held the State from intestine domestic foes within, and the attacks of traitors leagued with such without; had not kept the ten thousand rebel prisoners of war confined in the neighborhood from being released by these Knights and men of the order of the Sons of Liberty—"Oh liberty, what crimes are committed in thy name!"—there would have been no courts in Indiana, no place in which the Circuit Judge of the United States could sit in peace to administer the law, and that Judge would have been like some of his brethren of other Circuits in the earlier part of the war, a fugitive from district, friends and home, and flying for an asylum and sanctuary to the army of the United States.

If this Court will take notice that justice could only be administered in Indiana because of the immediate protection of the bayonet, and therefore by the permission of the Commander of her armed forces, to which the safety of the State, its citizens, courts and homes were committed, then the Court will have taken notice of the precise state of facts as to the existence of warlike operations in Indiana, which is spread upon the record, and we are content with the necessary inferences.

PRECEDENTS.

Upon our approach to the discussion of the questions at bar, we are taunted with the great dearth of legal precedents bearing on the subject. I admit the fact that there is a great dearth of precedents, and of necessity it

must be so, although if one looks at the battery of books which the gentlemen have spread on these tables, it would be supposed that these questions were of every day occurrence. Why is it that there is such a want of precedents upon the exact point raised in this record? Because the facts are unprecedented; the war out of which they grew is unprecedented; the clemency that did not at once strike down armed traitors, who in peaceful communities, were seeking to overturn all authority, is unprecedented; the necessity which called forth this exertion of the reserved powers of the government is unprecedented. Show me the instance in an enlightened age, in a civilized and Christian country, where almost one-half its citizens undertook, without cause, to overthrow the government; and where cowardly sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion and treason, and then I will show you a precedent for hanging by Military Commission such traitors, which unfortunately this case will never show to the world hereafter, for in the cases arising in this civil war, but one man was executed. If these men had been hanged, as for their confessed crimes they richly deserved, this case never would have arisen, and your Honors' decision would never furnish the precedent for the action of loyal men which it ought now to do.

This is the value of this case: whenever we are thrown into a war again; whenever, hereafter, we have to defend the life of the nation from dangers which invade it, and to those dangers I shall presently call your attention, we shall have set precedents how a nation may preserve itself from self destruction. In the conduct of the war, and in

dealing with the troubles which preceded it, we have been obliged to learn up to these questions; to approach it step by step, and some of the steps are very curious. As the dangers, to which we as a nation are exposed, have been brought before us by the learned gentleman who has just sat down, perhaps he will pardon me if I call attention to another danger by which this nation may lose its life and its government sink into chaos.

THE GREAT DANGER OF THE NATION.

He told you, with rotund voice and very great earnestness, of which we cannot complain, that "there were dangers which might threaten the life of the nation, and in that case it would be the duty of the nation, and it would be its right, to defend itself." He classed those dangers thus: first, rebellion; second, foreign invasion; third, corruption of civil administration; and he says further, there were within the Constitution powers sufficient to enable the country to defend itself from each or all these dangers. But, may it please your Honors, there is a fourth, a greater, a more imminent, a more perilous danger, from which this country came nearer ruin than by any other, in regard to which the gentleman had some unfortunate experience which he forgot to mention. That danger is *imbecility of administration;* such an Administration as should say "there is no constitutional right in a State to go out of the Union, but there is no power in the Constitution to coerce a State or her people, if she choose to go out." It is in getting rid of that danger, unenumerated by my learned friend, that we have had to use military power, military orders, martial law and Military Commissions. The country had met two insurrections

without shock; had been invaded by the legions of the strongest warlike nation in the world, flushed with victories of the Peninsula over the Marshals of Napoleon, without danger, and in its virtuous strength could laugh at any corruption in the management of its Government, but the imbecility of administration that last preceded the war, was almost too much for us!

There are many questions, may it please your Honors, to be presented by argument and illustration, as to which you will be thankful to me that I spare your attention. These will be dealt with by my learned Brothers who follow; and therefore the fact that such questions are not called to your attention, as they should otherwise be in the opening argument, will not show that they are to be entirely omitted.

Now, then after a moment's statement of the case, may we proceed to apply to it the proper principles of law.

THE CASE STATED.

The record discloses that in Indiana, under the circumstances I have mentioned, there arose an Order of American Knights or Sons of Liberty; and that those American Knights conspired to seize the United States arsenals in that military district; to release the prisoners of war restrained in the military prisons, under charge of the military authorities; and arm such prisoners; to join them with such other forces as they could raise, and to march into Kentucky and Missouri, (Record page 13). The conspirators, of whom the relators were the chief, communicated with the enemy to induce them to invade the States of Kentucky, Indiana, and Illinois. They were

co-workers with one John Morgan, of whom your Honors may perhaps take judicial notice. The petitioners were officers of a military force organized and armed for these and other like purposes, (Record, page 17). They advised and counseled the enrolled militia of the United States to disregard the authority of the United States, and to resist the draft ordered to increase the army of the United States, and armed citizens of the State for the purpose of resisting the draft, (Record, page 15). They attempted to introduce the armed forces of the United States into the loyal States, to overthrow and destroy the Government of the United States. All these practices being done within the military lines of the army, as they must have been, because your Honors will observe there were arsenals and depots of prisoners, military operations, and preparations against invasion, at this point, these men were arrested, not by military authority of Alvin P. Hovey, Major General alone, which would have been sufficient, but by the authority of the President of the United States, taken to Indianapolis, and there tried, and found guilty of every one of the charges alleged against them, of which, I repeat, they do not deny on oath that they were guilty, and were condemned to be hanged. There the record leaves them. I am told that they have been respited, and their sentence commuted, and hence they are enabled to bring up this question. That sentence of conviction was sent to the Secretary of War, through the regular military channel of communication, the several Commanders, and was approved by the President of the United States; so that we have the President of the United States, the Executive Head of the Government, in his military and civil

capacity, aided by every intendment of law, forced forward by every necessity of which he alone is the judge; incited by every duty which devolves upon him by his constitutional oath, using the whole executive, civil and military power to retrain and punish these guilty parties. It is to liberate them from this, which we claim to be the rightful exercise of executive power, that this Court is called upon to interfere.

We assume it to be the regular and well-settled practice of the Courts of the United States, that when the petition and exhibits show the cause of detention fully, the writ of *habeas corpus* will not be issued, because there is no occasion to get, by return to that writ, the facts causing the detention, which already sufficiently appear. Therefore, I think we may say that the questions upon which the judges in the court below divided, are resolvable into two as stated in the Brief.

THE QUESTIONS BEFORE THE COURT.

The first is, had the Military Commission jurisdiction to hear and determine the matter submitted to it, upon the facts and circumstances stated in the petition and exhibits? I am earnest in season and out of season upon this point. Pray keep it with you always. I will read it, so that there need never be a mistake upon it. "On the facts stated by said petition and exhibits," not any other facts, "ought the said Lambdin P. Milligan to be discharged from custody as is in his petition prayed." The second question is, whether upon the facts stated in his petition and exhibits—none other—the Military Commission therein, had any authority to try said Milligan in manner and form as in the petition and exhibits are stated.

We have then, to call your Honors' attention to the fact that there is no objection to the regularity of the proceedings of the commission. My learned brother [Judge Black] was pleased to make himself merry with putting supposed questions, and giving supposed answers to his questions, as to the method of proceeding before the Military Commissions, but no question is raised upon the record or upon the briefs, that all the proceedings were not regular according to the custom and usages of war. They have all the *indicia* of regularity; they are approved by the several intermediate Commanders; by the Secretary of War, and by the President of the United States, and the men were by them ordered to be executed. There is nothing alleged showing why the proceedings are not regular, and therefore we are brought back to the simple question of jurisdiction.

MILITARY COMMISSIONS ARE NOT COURTS.

I shall not detain your Honors a moment by arguing, what I suppose everybody admits, that if one has not the jurisdiction, i. e. has not the right, to say what shall be done with another, all his acts towards that other are unauthorized and void. I think a large portion of the argument on the other side has proceeded upon the mistake, that a military commission is a *Court*, either under, by virtue of, or without the Constitution. I shall have the honor to make no claim in its behalf that it is a Court. It is not a Court, and your Honors have decided that question not long ago. A Military Commission, whatever it may be, derives its power and authority wholly from martial law, and by that law, and by military authority only, are its proceedings to be adjudged and reviewed. In the

case of Dynes vs. Hoover, 20 Howard, 781, this was decided in regard to a court martial. The same conclusion was sustained in Vallandigham's case, 1st Wallace, 243, and it is remarkable that the research of my learned opponents, which has brought forward this array of authorities from England and France, should have wholly overlooked this case, which is precisely the case at bar. Vallandigham was one of your Sons of Liberty or Knights of the American Circle, or something of that sort. He was one of those good citizens who invoke the Constitution to protect them while endeavoring to break down every constitutional provision which sustains the government. And as such men are very apt to do, in time of war, be brought himself under the animadversion of a Military Commission. I have not heard of any loyal patriotic man having been specially troubled with Military Commissions, practically or experimentally. Your Honors are, unfortunately, by having to hear so much about them.

VALLANDIGHAM'S CASE.

Vallandigham got in the hands of a Military Commission, and he invoked the aid of your Honors to get away from it. Why did not your Honors then decide, in the language of my learned brother, that "under no possible circumstances can a Military Commission have any right, power, authority, or jurisdiction?" Why did not your Honors decide in the language, not very elegant, of the gentleman who has just taken his seat, that a Military Commission was a mere "means to aid the Attorney General in butchering the people," and therefore that Vallandigham should be sent back to his treason and his household gods of rebellion? No such decision was made. You said he had

"appealed unto Cæsar and anto Cæsar he should go;" and you left him to the tender mercies of this not very merciful tribunal, as it is claimed. You decided that a Military Commission "is not a Court within the meaning of Section 14 of the Act of 1789;" that this Court has no power to issue a writ of *certiorari*, or to review or pronounce any opinion upon the proceedings of a Military Commission; that affirmative words in the Constitution, giving this Court original jurisdiction in certain cases must be construed negatively as to all others. The Court in its opinion, *ex parte Metzger*, (5 Howard, 176),

"Determining that a *writ of certiorari* could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a Court of Military Commission exercise a special authority. In the case before us, it was urged that the decision, in Metzger's case, had been made upon the ground that the proceeding of the district judge was not judicial in its character, *but that the proceedings of the Military Commission* were so; and further, it was said that the ruling in that case, had been overruled by a majority of the judges in Raines' case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the Military Commission, we cite what was said by this Court in the case of *The United States* v. *Ferreira*, (13 Id., 48.)

"The powers conferred by Congress upon the District Judge and the Secretary are judicial in their nature, for judgment and discretion must be exercised by both of them; but it is not judicial in either case, in the sense in which judicial power is granted to the Courts of the United States. Nor can it be said that the authority to be exercised by a Military Commission is judicial in that sense. It involves discretion to examine, to decide, and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum*, to review or reverse its proceedings, or the *writ* of *certiorari* to revise the proceedings of a Military Commission."

Now if this language of the Supreme Court of the United States means anything,—and far be it from me by putting the phrase in that form, to insinuate that it does not,—there is an end of this case. Let me repeat it, for it is

the judicial determination of the highest Court in the land, upon exactly the tribunal whose proceedings are at bar. "There is no jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum*, to review or reverse its proceedings, or the writ of *certiorari* to revise the proceedings of a Military Commission."

It may be said, doubtless it will be, as a just criticism upon this argument, that the question in Vallandigham's case turned upon the *original* jurisdiction of the Supreme Court; but, I respectfully submit that your Honors could have cut the knot much more shortly by saying, in the language of the learned counsel, the proceedings are wholly void; "there is no such claim, right, title or thought, as that any citizen can be held by, and in virtue of, any Military Commission," and therefore while we do not choose, originally, to issue the writ, we say he is entitled to be discharged," because I take it, the Supreme Court would not allow the personal liberty of the citizen to be taken away upon so narrow a question.

JURISDICTION DERIVED FROM MARTIAL LAW. WHAT IS THAT LAW?

Now, where do Military Commissions obtain their jurisdiction? From martial law. What, then, is martial law? It is ever perilous to attempt to give definitions, but I submit that the definition, which I have had the honor to put upon the brief, for the consideration of the Court, and which I shall endeavor to illustrate and affirm by various authorities, is a correct, legal, constitutional definition of a necessary power of the military arm of the government. Martial law is the will of the commanding officer of an armed force or of a geographical military

department, expressed in time of war, within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military or supreme executive chief. This definition is substantially taken from the dispatches of the Duke of Wellington. When he was called upon to answer a complaint in Parliament for this exercise of military jurisdiction and martial law in Spain, he thus defined it. Afterwards a debate arose upon the conduct of Viscount Torrington, for his administration as military governor of Ceylon, and the question arose as to the jurisdiction claimed. An appeal was made, in the course of the debate, to the Duke of Wellington by Earl Grey, who was arguing the case of Viscount Torrington, and the noble Duke, thus called upon, said :

THE DUKE OF WELLINGTON'S DEFINITION.

"He contended that martial law was neither more nor less than the will of the general who commands the army. In fact, martial law meant no law at all. Therefore, the general who declared martial law, and commanded that it should be carried into execution, was bound to lay down distinctly the rules and regulations and limits according to which his will was to be carried out. Now he had, in another country, carried on martial law; that was to say, he had governed a large proportion of the population of a country, by his own will. But then, what did he do? He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country; and he governed it with such moderation, he must say, that political servants and judges who at first had fled or had been expelled, afterwards consented to act under his direction. The judges sat in the courts of law, conducting their judicial business and administering the law under his direction. *Hansard's Parliamentary Debates*, 3d series, vol. ixv, p. 879.

ATTORNEY GENERAL CUSHING'S OPINION.

I shall not trouble your Honors with reading all the authorities on the point, but they are collected in the best discussion which I have been able to meet with in this

country, upon the subject of martial law, and that discussion took place under circumstances and at a time when no passion could intervene, when nothing but the pure logic of reason could guide the judgment, differing from now when our feelings are aroused and our interests and prejudices are involved. At such a time the question was brought before a gentleman who, when I name him, needs no eulogy from me before this Court for his learning, his intellectual attainments, his legal acumen, and his ripe judgment. Endorsed as a Supreme Judge of the State of Massachusetts, where, you will pardon me for saying, that we yield to none in the learning and ability of our judges, he brought to his administrative duties, as law officer of the United States, every power of thought, every loyalty of feeling, to the Law and the Government and every page of his varied learning. The question, what is martial law, being submitted to Mr. CUSHING, in the 8th volume of the Opinions of the Attorneys General, had that exhaustive treatment which every subject receives at his hands; and I think if my brothers had read this opinion, they would have saved themselves some of the citations which they have brought before the Court. They have mingled, as have all the common law lawyers, martial law and military law, which are to be kept quite distinct. Mr. Cushing, in the opinion to which I refer, says:

"In the great case of Grant vs. Sir Charles Gould, Lord Loughborough said that 'the essence of martial law consists in its being a jurisdiction over all *military* persons in all circumstances. And because military men are triable for many offences, and have their personal rights for the most part regulated by the common law,—'Therefore,' he says, 'it is totally inaccurate to state martial law as having any place whatever, within the realm of Great Britain.' (ii. H. Blackstone, page 98.")

"All that is 'totally inaccurate.' *Military* law, it is now perfectly understood in England, is a branch of the law of the land, applicable only to certain acts of a particular class of persons, and administered by special tribunals, but neither in that nor in any other respect essentially differing, as to foundation in constitutional reason, from admiralty, ecclesiastical, or indeed chancery and common law.

It is not the 'absence of law' supposed by Sir Matthew Hale; nor is it under any circumstances, the 'martial law' imagined by Lord Loughborough. That is the system of rules for the government of the army and navy established by successive acts of Parliament." *Opinions of Attorney General*, vol. 8, p. 366.

The discussion of Mr. Cushing leaves the definition of martial law precisely where we put it, only not embracing all the classes of subjects that we have put in our definition. Will your Honors go with me a moment, now having given some authority for my proposition, while I analyze one definition.

ANALYSIS OF MARTIAL LAW.

It is the will of the commanding officer. Being to be exercised upon the instant, it can have no other source. The commanding officer of an armed force, is another element of the definition. It is usually said "the commanding general of an army," but martial law may need to be exercised in a much more circumscribed theatre and by a smaller force, and therefore I say "by a commanding officer of an armed force or of a geographical department;" that is, a department which the supreme executive or legislative power of the State carrying on war has set apart for military operations under a single Chief. Thus he may not command an army, but commanding a department he would have power, if the exigency required it, to use martial law. Take for example General Dix, in command of the department of the East, not in command of an army; yet there was an exigency once in his depart-

ment where it was necessary to have martial law, and force was sent him, and martial law prevailed, and a city was kept quiet, during an exciting election, without much proclamation or without much exhibition of force; still the exigency arose, and any body of wrong doers, acting in hostility to the Government, would have found that martial law prevailed there *eo instanti*, and in that belief the good and loyal reposed in calm quiet.

Martial law must have another distinguishing quality. It must be the will of the Commander, exercised under the limitations mentioned in *time of war*, and that is a portion of the definition which is fatal to every authority read by my learned brother (Mr. Garfield) yesterday, as I shall have the honor to show.

Now I propose, by another portion of the definition, to answer what was said by my brother Black, when I was uncourteous enough to interrupt him, and say that we did not claim that "martial law could be exercised here when there was war anywhere on the face of the globe." When he attributed to us that doctrine, I said we did not so claim, but we claimed it only "within the limits of a military jurisdiction." When is it to be exercised? When "necessity demands and prudence dictates." That is to say, we claim that in carrying on war, when in the judgment of him to whom the country has confided its welfare, the command of thousands of its bravest and best sons, whose single word, as commander of the army, can devote to death thousands of our brothers, when necessity demands, we give him the discretion to govern the wicked and disloyal—none other need governing—within the military lines, outside of the ordinary forms and constitutional limits of law. By the constitutional power of carrying

on war, we give him the power to govern the rebellious, the criminal, the robber, the murderer. I hear no eloquent diatribes in this forum against the power of the Government to send into the "imminent deadly breach," at the will of a single commander, one hundred thousand men to wounds and death—or haply worse—imprisonment; but learned counsel are horrified, and large collections of books are arrayed, when we say that the same commander has the power to punish a single cowardly traitor who sneaks in the darkness to stab the country in the back.

In time of war, to save the country's life, you send forth your brothers, your sons, your dearest and best, and put them under the command, under the arbitrary will of a General to dispose of their persons and their lives as he pleases; but if, for the same purpose, he touches your Vallandighams, your Milligans, your Sons of Liberty, that is a usurpation of power,—the Constitution is invoked in their behalf,—and we are told the great fabric of civil government is about to fall! I respectfully submit that if you entrust him with the power, the will, the authority to act in the one case, he ought to have sufficient discretion to deal with the other; and the country will not be so much endangered from the use of both as it would be if he used the first and not the last.

DISTINCTION BETWEEN MARTIAL LAW, MILITARY LAW AND THE LAWS OF WAR.

Before proceeding to the discussion of the several authorities which will be cited, allow me to call your Honors' attention to some distinctions which we shall need to carry along with us. We have defined martial law. Now what is military law? Military law consists of the rules and regulations made by the legislative power of the State

for the government of its land and naval forces. To this we have cited the note of William Kent, I think—I am sure it is not the note of the chancellor—in 1 Kent's Commentaries, page 341, in which this very distinction is made.

"Military law is a system of regulations for the government of the armies in the service of the United States, authorized by the act of Congress of April 10, 1806, known as the articles of war, and naval law is a similar law for the government of the navy under the act of Congress of April 23, 1800. But martial law is quite a distinct thing, and is founded upon paramount necessity and proclaimed by a military chief."

Then there are the laws of war. When this expression is used in a generic sense, we say all laws of military operations are the laws of war, but when it is used in a specific sense, the laws of war are those which govern the conduct of belligerents toward each other, and other nations *flagranti bello*. These several kinds of law are to be enforced under different jurisdictions as I will explain in a few moments.

FURTHER AUTHORITIES AS TO MARTIAL LAW.

Let us return, and see if cannot fortify our definition of martial law, at least in the extent of its operations. I say there is such a thing, there can be such a thing, it is known to our laws, it is constitutional, and was derived from our mother country. On this point I will first drink from the same fountains that my brothers seek. They have cited De Lolme's Constitution of England. I will read a passage from the second volume of Stephen's edition of De Lolme, of 1838, page 972:

DE LOLME.

"In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and authority, the same military laws by which this army is kept together, must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders."

I pray your Honors now to look at this authority in another view, in which we shall have occasion to consider it, for I do not care to turn to it again; and that is, how far, when the sovereign looks to his army for safety, martial law extends. It extends, says De Lolme,

"Over the whole nation, not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders. The martial law, concerning these tender points, must be *universal*. The jealous regulations, concerning mutiny and contempt of orders, cannot be severely enforced on that part of the nation which secures the subjection of the rest, and enforced, too, through the whole scale of military subordination, from the soldier to the officer, up to the very head of the military system, while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom:—that secret disposition which prompts mankind to resist and counteract their superiors, cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other."

JOHN QUINCY ADAMS.

Now I pass from one of the most learned commentators upon England's Constitution, to one who may be said to have lived our Constitution; who came into life almost as the Constitution came into life; whose father was the second chief executive officer of the nation; conversant with public affairs and executing constitutional law in every department of the Government from earliest youth, wielding himself chief executive power, he was admitted to be one of the ablest constitutional lawyers of his time; *inter pares facilis princeps*; so zealous in public duty that at

the age when other men seek rest, he left the quiet of literary ease, and the comforts of an abundant home, to take part in the legislation of the land, in behalf of the bondman, and to aid the right.

John Quincy Adams never tolerated the exercise of any power beyond the Constitution. He knew all the powers of the Government within the Constitution, and knowing them he had the courage in every forum to maintain them. Venerable, eloquent, learned and liberty-loving old man, well may his last words have been, "this is the last of earth, I am content"—with a life well spent and with work well done. Hear then what he says upon the extent of the action of the laws of war, as he thundered it into the unwilling ears of those who have since led rebel armies and been in the counsels of rebel Senates. In 1842, speaking of the effect of war upon the municipal institutions of a country, Mr. Adams said:

"Slavery was abolished in Columbia, first, by the Spanish General Morillo, and secondly, by the American General Bolivar. It was abolished by virtue of a military command given at the head of the army, and the abolition continues to be law to this day. It was abolished by the laws of war, and not by municipal enactments; the power was exercised by military commanders, under instructions, of course, from their respective Governments. And here I recur again to the examples of General Jackson. What are you now about in Congress? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a Judge, under the laws of the State of Louisiana. You are going to refund him the money, with interest; and this you are going to do because the imposition of the fine was unjust. Because General Jackson was acting under the laws of war, and because the moment you place a military commander *in a district which is the theatre of war, the laws of war apply to that district.*"

You heard my eloquent friend [General Garfield] say yesterday, that nobody defended the act of General Jackson, in declaring martial law in New Orleans, as *justifiable*, but only as *excusable*. Here I have shown you that

the man who twice contended with Jackson for the Presidency, and who preceded him in the Presidential chair, the best constitutional lawyer of his age, has said "Congress proposed to refund the fine, because it was *unjust* to take,"—not excusable, no bill for relief, and on that point, by and by, I trust I shall be able to convince the Court that my Brother was as far wrong in this, as he has been in many other of his citations. But let us see what Mr. Adams says further on this question:

MR. FIELD. What do you read from?

MR. BUTLER. From the thirty-fourth page of a volume of records and speeches in my hand. It is a volume containing records and speeches very difficult to find. Mr. Adams in that day was in the habit of publishing his speeches in the Boston Advocate. I believe there were some supposed constitutional objections to their being put in the Congressional Globe, as incendiary documents, which the Globe could not circulate South, and therefore it is difficult to find them. The book is at the service of my friend and the Court. Let me read further from the same speech.

"I have a correspondence between General Jackson and the Governor of Georgia, during the Seminole campaign, in which Gen. Jackson, addressing Governor Rabun, asserted the principle that he as Governor of a State within his (Gen. J.'s) military division, had no right to give a military order while he (Gen. Jackson) was in the field. The then Governor of Georgia, (and I do not know but what it killed the poor man, for he died soon after) did contest the power of Gen. Jackson. He said all he could for State rights, but Andrew Jackson had given an order, and that order was carried into effect, while the order of the Governor was suppressed."

I here call your attention to the fact that military orders have always been against State rights. They were then, and have been since, and are now. State rights

have gone out by the combined effect of the bayonet, bullet, and Military Commissions. Mr. Warren of Georgia, undertook to explain. Mr. Adams resumed:

"I am glad to hear the explanation, and am entirely willing to concede whatever of merit is due to the Governor of Georgia, for resisting what he conceived to be military tyranny. But I am afraid, nevertheless, whatever may have been the success of Governor Rabun in this contest, General Jackson had the right of the question. I might furnish a thousand proofs to show that the pretentions of gentlemen to the sanctity of their municipal institutions under a state of actual invasion and of actual war, whether servile, civil, or foreign, is wholly unfounded, and that *the laws of war do, in all such cases, take the precedence.*"

Let me read this again, because it seems to go to the very root of the matter:

"I might furnish a thousand proofs to show that the pretensions of gentlemen to the sancity of their municipal institutions under a state of actual invasion and of actual war, whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do, in all such cases, take the precedence."

"I lay this down as the law of nations. I say that the military authority takes for the time the place of all municipal institutions, and slavery among the rest; and that, under that state of things, so far from its being true that the States where slavery exists have the exclusive management of the subject, not only the President of the United States, but the commander of the army has power to order the universal emancipation of the slaves. I have given here more in detail a principle, which I have asserted on this floor before now, and of which I have no more doubt, than that you, sir, occupy that chair. I give it in its development, in order that any gentleman, from any part of the Union may, if he thinks proper, deny the truth of the position, and may maintain his denial; not by indignation, not by passion and fury, but by sound and sober reasoning from the laws of nations and laws of war. And if my position can be answered and refuted, I shall receive the refutation with pleasure; I shall be glad to listen to reason, aside, as I say, from indignation and passion. And if, by force of reasoning, my understanding can be convinced, I here pledge myself to recant what I have asserted."

But the glorious old man went down to the grave asserting this principle on the floor of Congress, dying in the harness, with liberty on his tongue, and freedom for all in

his heart. Methinks if my brothers will go to the debates which the Southerners had with the old man, they will find that all the constitutional provisions, which they have invoked here in behalf of personal liberty, were then used against the "old man eloquent" in behalf of human slavery. Constitutional guards, and constitutional enactments were invoked to enslave men, because that happened to be the use which bold bad men wish to make of the Constitution. Now the Constitution is invoked in behalf of liberty of the criminal. Strange that always there should be something black, either in the face or character of the men, when constitutional scruples are the theme of discussion!

CASE OF GENERAL JACKSON IN NEW ORLEANS.

May it please your Honors, I wish to use the minutes that I have, before the Court adjourns, with the question of General Jackson's fine. That was the test case of martial law in this country. I have lived to hear many things, but I never expected to live to hear it asserted as here, that Judge Hall and the judges of Louisiana asked General Jackson to declare martial law in New Orleans; if so, they add the weight of their authority in our favor. Parton gives a very different account of the matter. Let me state briefly the material facts. On the 15th of December, 1814, General Jackson declared martial law within his camp, extending four miles above and four miles below the city. The press immediately began to murmur, but did not speak out until after there came unofficial news of the conclusion of peace. Then it was said that the declaration of peace, *ipso facto*, dissolved martial law; that the General had no right to maintain martial law any

longer; and their murmurs very loudly increased. But, the General said, that he had not received any official news of the establishment of peace; and until it came officially, aye, by proclamation of the President, he should not cease his military operations for safety of the city. Thereupon what happened? One Louallier was arrested by the military, for alledged seditious language, and Judge Dominick A. Hall, of the United States District Court, interposed with his writ of *habeas corpus*. This was done on the 5th of March, 1815. Mark the time. The battle of New Orleans, which substantially removed all danger, was fought on the 8th of January, and on the 5th of March following, Dominick A. Hall undertook to interfere with a military arrest. Jackson sent his aid-de-camp, arrested Hall and put him in the barracks. The claim then as now was that the necessity for martial law had ceased; why hold Hall, after the news of peace had come? Why not turn him over to the civil authorities? But General Jackson was there, not James Buchanan, and therefore we have this order:

"HEADQUARTERS SEVENTH MILITARY DISTRICT,
NEW ORLEANS, MARCH 11, 1815.

"SIR—You will detail from your troop a discreet non-commissioned officer and four men, and direct them to call on the officer commanding the Third United States Infantry for Dominick A. Hall, who is confined in the guard-house for exciting mutiny and desertion within the encampment of the city.

"Upon receipt of the prisoner, the non-commissioned officer will conduct him up the coast beyond the lines of General Carroll's encampment, deliver him the enclosed order, and set him at liberty.

"THOMAS BUTLER, Aid-de-camp.

"Captain PETER V. OGDEN, commanding troop of Cavalry, New Orleans."

The General was as little apologistic to the judge as he was peremptory in his order. What next took place? Peace was declared in an official manner; the proclama-

tion of martial law was withdrawn; Judge Hall took his seat on the bench, and his first act was to issue an attachment of contempt for General Jackson. We have heard long orations here upon the danger of a military commander being judge, jury, and executioner in his own cause. The very thing Judge Hall did was to take a seat on the bench and become accuser, judge, and executioner. When General Jackson was brought into Court there was such an angry glowering of excited men around the General, that the Judge said, in hurried words and trembling accents, "I will adjourn my Court; I cannot carry on the ordinary operations of justice here in the midst of a mob;" but the man of the all-powerful will, who had wielded martial law for the safety of his country, showed that when that safety was assured, he could bow to the civil law, in the person of one of the meanest of its ministers, with the utmost respect. Jackson arose and said, "If I have any friends here, let them not interfere, for my sake; this is a court of justice; I abide its judgment." When he offered an explanation of his conduct, the judge refused to receive it, and fined him a thousand dollars, and the fine was paid in quiet submission to the law. The General left the court house, to be dragged in triumph to his lodgings by the hands of the citizens, who admired as well his vigor of administration as his obedience to the laws of the land. Congress afterwards attempted, not to excuse, not to explain away that act of General Jackson, declaring martial law, but to justify it. I was never more surprised in my life than when I heard my learned brother who is legislating for us in the other end of the capitol [Gen. Garfield], say that no body justified General Jackson. Why, that was the whole question at issue between the

parties in Congress. A bill was brought in to indemnify the General, and thereupon some of the Vallandighams who were in the Senate of that day, said, "No, we will not justify, we will excuse this action in General Jackson, we move therefore to change the title of the bill into a 'bill for the *relief* of General Jackson.'" If any man had proposed to the old man to give him a beggar's relief, he would have said "by the Eternal," and the man that made the proposition would have melted from his seat. On the contrary, Mr. Robert J. Walker, speaking for General Jackson, made a minority report, in which he put the whole question upon the ground of justification. Let me read from that report, which is to be found at page 641 of the 14th volume of Benton's condensed debates:

"The undersigned, one of the Committee on the Judiciary of the Senate of the United States, to whom was referred the bill to indemnify Major General Andrew Jackson for damages sustained in the discharge of his official duty, dissents from the views of the majority of the committee in this case.

"That General Jackson, and those united with him in the defence of New Orleans fully believed this emergency to exist, is beyond all doubt or controversy. If, then, this was the state of the case, it was the duty of General Jackson to have made the arrest; and the act was not merely excusable, but justifiable. It was demanded by a great and overruling necessity; and had he failed to assume this responsibility, and the consequences which he anticipated had occurred, he would have merited and received universal execration. Such being the facts, was General Jackson bound to liberate the prisoner, immediately upon the mandate of the Federal judge of that district? If, as General Jackson believed, the danger was still imminent—that the liberation *at that time* of the prisoner would overthrow his power, and bring his authority as commander into contempt—that it would surely produce a repetition of similar acts of mutiny and treason, and demonstrate his inability to restrain, much less to punish them—that it would lead to the depopulation or defeat of his army, and the surrender of the city, he was bound to defend; the same overruling necessity, which justified the arrest, would require the detention of the prisoner until the emergency had passed, and he could be surrendered with safety into the hands of the civil authority. The law which justified the act was the great law of necessity; it was the

law of self-defense. This great law of necessity—of defense of self, of home, and of country—never was designed to be abrogated by any statute, or by any constitution. This was the law which justified the arrest and detention of the prisoner ; and, however the act may now be assailed, it has long since received the cordial approbation of the American people. That General Jackson never desired to elevate the military above the civil authority is proved by his conduct during the trial, and after the imposition of this fine."

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"The title is, 'A bill to indemnify Major General Andrew Jackson for damages sustained in the discharge of his official duty." The title is in strict conformity with the facts of the case, and, in the opinion of the undersigned, should be retained. The committee, however, propose to reject it, and to substitute, as a title, 'A bill for the relief of General Andrew Jackson.' General Jackson has never solicited, nor will he ever receive, such relief. He is no mendicant ; he asks no alms, or pension, or bounty from his country ; but that country demands that his money shall be returned as an act of justice. It was a penalty incurred for saving the country, and the country requires that it shall be restored."

The fine was remitted with interest.

My learned brother, I respectfully suggest, should ask the pardon of the old General for ever supposing that he would take an excuse for his conduct, on that occasion.

MARCH 8th.

MR. BUTLER. At the adjournment, yesterday, may it please your Honors, we were considering the noted case of the exercise of martial law at New Orleans by General Jackson, and whether or not any tribunal has been found to justify it. We had seen that the Congress of the United States had so justified it. We had seen further that the higher authority, to which we must all bow when properly expressed, the voice of the people, had also ratified it.

THE CASE OF LUTHER v. BORDON.

Has any judicial decision been found opposed to it? Never but one. In the case cited upon the relators' brief in 3d Martin's Reports, the Supreme Court of Louisiana,

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sitting under the excitement of the collision between the military and the judges, because judges even can have feelings like other men, declared against it. I think I am correct in saying that no other Court has ever been found to declare against that power. In the case of Luther v. Borden, 7th Howard, of which Mr. Justice Woodbury's dissenting opinion has been cited by my brothers against the opinion of the majority, which was that martial law did obtain in Rhode Island, sustains General Jackson. Lest I should state the majority opinion incorrectly, I will quote the language of the Chief Justice :

"Unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands."

As a political question, if your Honors will allow me the observation.

"And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this Court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed."

Now, then, we say, if martial law ever obtains in this country, what becomes of the argument as to the force and effect of the amendments of the Constitution? But of that hereafter. I was proceeding to remark, however, that when Mr. Justice Woodbury gave a very elaborate

dissenting opinion in opposition to the decision of the Court, which it was then understood established the rights of martial law, he himself took care to justify General Jackson, the man who of all others he revered as a statesman and honored as a patriot, taking care, of course, to allow his opinion to go no farther than such justification. I read from that dissenting opinion on the 83 page of 7 Howard: "On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known in New Orleans." Not excuse, "justification."

We have put in our definition of martial law, the words *tempore belli*. That portion of the definition answers every question, which has been so elaborately argued here, as to when this law, for which we contend, shall be exercised and when it may obtain. In time of war and only then. When the state of war obtains, that it has effect upon all men in the kingdom, in the country, is settled among the very archives of black letter law. I beg leave to refer your Honors to 2 Coke—Littleton, 249 A, sec. 412:

COKE—LITTLETON.

"So when by invasion, insurrections, rebellions, and such like, the peaceable course of justice is disturbed and stopped, so as the Courts of Justice be as it were shut up"—"*et silent leges inter arma*, then it is said to be time of war. And the trial hereof is by the records, and judges of the Court of justice; for by them it will appear whether justice had her equal course of proceeding at that time or no, and this shall not be tried by jury.

If a man be disseised in time of peace, and the discent is cast in time of war, this shall not take away the entry of the disseisee, *Item tempore pacis, quod dicitur ad differentiam eorum que fuerunt tempore belli, quod item est, quod tempore guerrimo, quod nihil differt a tempore juris and injuriæ; est enim tempus injuriæ, cum fuerant oppressiones violente, quibus resisti non potest et disseisine injuste.*

So as hereby, it also appeareth, that time of peace is the time of law and right, and time of war is the time of violent oppression, which cannot be

resisted by the equal course of law. And, therefore, in all real actions the *xplees*, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law."

EARL LANCASTER'S CASE.

Now whence the phrase "if the King's Courts are shut up," "or are open." My Lord Coke cites it from Lancaster's case, which is so much relied on by the relator's, that it has been printed at length in their brief, if that can be called brief, which is so long. I desire now to call attention to all the English authorities cited upon this question by the other side, for you will do me the honor to remember that I have said all of them, applied to the time of peace. Blackstone says:

"Martial law which is built upon no settled principles, ought not to be permitted in time of peace, when the Courts are all open."

Again, Hale's plea of the Crown:

"If in *time of peace* commission issue to exercise martial law, and such commissioners condemn any of the King's subjects, (not being listed under the military power), this is without all question a great misprision and an erroneous proceeding, and accordingly adjudged in Parliament, in the case of the Earl of Lancaster. Parl. 1, Ed. 3."

You see it is always *tempore pacis*. Now what was the Earl of Lancaster's case? He raised a rebellion, how formidable will be seen in a moment; he was condemned and executed by sentence of a court-martial, after the rebellion had been subdued; and thereupon his brother brought a writ of error, by leave of the King, before the King himself in Parliament, for the purpose of reversing the judgment and obtaining his lands, and among the errors assigned, was this:

"Yet the said Earl Thomas, a liege man of our lord and father the King, aforesaid, &c., was taken in TIME OF PEACE, and brought before the King himself; and the said our lord and father the King, &c., remembered that the

same Thomas was guilty of the seditions and other felonies in the aforesaid contained; without this, that he arraigned him therefor, or put him to answer as is the custom according to the law, &c., and thus, without arraignment and answer, the same Thomas, of error and contrary to the law of the land, was *in time of peace* adjudged to death, notwithstanding that it is notorious and manifest that the whole time in which the said misdeeds and crimes contained in the said record and proceedings were charged against the said Earl, and also the time in which he was taken, and in which our said lord and father the King, remembered him to be guilty, &c., and in which he was adjudged to death, was *a time of peace*, and the more especially as throughout the whole time, aforesaid, the Chancery and other Courts of pleas of our lord the King were open, and in which *right was done to every man, as it used to be;* nor did the same lord the King in that *time ever side with standard unfurled;* the said lord and father the King, &c., *in such time of peace* ought not against the same Earl, thus to have remembered nor to have adjudged him to death, without arraignment and answer."

So that the whole record turned upon the question whether the rebellion being ended, peace having come, the Earl of Lancaster was liable to be adjudged by Military Commission in time of peace, and it was held that that was against common right.

THE PETITION OF RIGHT.

Now, I respectfully suggest that my brother, who opened secondly for the relators, [General Garfield] was mistaken in his learning, when he submitted to the Court that it was because of the ship-money and the trial of Hampden and others, that the petition of right was passed. It was because King Charles had quartered in the town of Plymouth, and in the County of Devon, certain soldiers in time of peace, upon the inhabitants thereof; and had issued his commission that those counties should be governed by "*martial law*," while the soldiers, in time of peace, were quartered there, and therefore the great Petition of Right; and it was adjudged that Military Commissions, issued in time of peace, should never have place in the law of England; and all the people to that, even

resisted by the equal course of law. And, therefore, in all real actions the *xplees*, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law."

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to this day, say Amen. Now, to show your Honors that I am right, let me turn for a moment to Hale's Pleas of the Crown, page 42 :

"Thirdly, The exercise of martial law, whereby any person should loose his life, or member, or liberty, may not be permitted, in time of peace, when the Courts are open for all persons to receive justice according to the laws of the land. This is in substance declared by the Petition of Right, 3, Charles I, whereby such commissions of martial law were repealed and declared to be contrary to law *in time of peace*."

We have heard the English Mutiny Acts cited. With your Honors' leave I will read from one :

"And whereas noe man be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law, or in any other manner than by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme, Yet neverthelesse it being requisite for retaineing such Forces as are or shall be raised during this Exigence of Affaires in their Duty, and exact Discipline be observed, And that Soldiers who shall Mutiny or stirr up Seditions or shall desert Their Majestyes Service, be brought to a more Exemplary and Speedy Punishment than the usual Forms of Law will allow"—

Then follow the enacting words of the act, thus:

"Whereas the raising or keeping a Standing Army within this Kingdome in *time of Peace*, unless it be with Consent of Parlyament is against Law, And whereas it is judged necessary by Their Majestyes and this present Parlyament, That during this time of Danger severall of the Forces which are now on foote should be continued."

To this day the form obtains. See the last Mutiny Act of April, 1865. So that your Honors will perceive that the law of England, from which we derive most of our laws, assuring personal liberty, carefully abstains from setting up one of the great constitutional provisions, trial by jury, as a protection of life and property, except in time of peace.

WALL'S CASE.

Again: My brothers have brought forward in their behalf, the case of Governor Wall, showing that Martial Law did not protect him for his action under it. He was Governor at Goreé, on the coast of Africa. A mutiny by his soldiers supervening because they could not get their pay, he sentenced one to eight hundred lashes by drum-head court martial, whereof the man died. Twenty years after, having lived abroad, he wrote a letter to the Secretary of State asking leave to return. He came home, and the newspapers were filled with abuse and misrepresentation and he was indicted, brought before the court, and convicted; and I undertake to say that if there ever was a judicial murder—and there have been some—if there ever was a case where a man, without cause and without right, was put to death, this was the case. I am not singular in that opinion. I hold in my hand the third volume of the Lives of the Lord Chief Justices, by Chief Justice Campbell, and in giving the Life of Lord Ellenborough, he says:

"During the short period of his Attorney-Generalship, no prosecution for treason or any political offence arose, but in his official character he did conduct one of the most memorable prosecutions for murder, recorded in our judicial annals. It brought great popularity to him and the Government of which he was the organ, upon the supposition that it presented a striking display of the stern impartiality of British jurisprudence; but after a calm review of the evidence, I fear it will rather be considered by posterity as an instance of the triumph of vulgar prejudice over humanity and justice."

I will not detain the Court by reading the facts, but I will read a single sentence from the address of Lord Ellenborough, the Attorney General, to the jury, and in that day no counsel were allowed for the defendant. Wall was pressed by this vulgar argument by Lord Ellenborough:

"He particularly dwelt upon the fact, that the men employed to inflict the punishment, were not the drummers of the regiment, but African negroes, and he pronounced the punishment wholly illegal, as the sentence could only have been passed by a general court-martial, assembled according to the 'Articles of War.'"

So the prejudice against the black man was at that day appealed to, to convict an innocent white one.

Another case is cited from the second volume of the second series of Hansard's Parliamentary Debates. My learned brothers, however, only read from the speeches of Sir James Mackintosh and Lord Brougham on that occasion. This was the case of the Rev. John Smith, of Demerara, who was tried and convicted by a court martial, for inciting negroes to mutiny in Demerara, six weeks after a rebellion was wholly quelled, and when there seems to have been no necessity for such proceedings, nor any reason that they should be carried on. The excuse of the Governor was, that the planters were so infuriated against Mr. Smith that he thought that trying him by court martial would secure him better justice. I agree that this is no excuse, that it creates no necessity, as was said in argument by Dr. Lushington:

"For six weeks then, before the court martial assembled, and twelve weeks before the Court pronounced sentence of death on Mr. Smith, all hostility had ceased; no necessity for their existence can be pretended and every act which they did was in open deliberate defiance of the law of England."

Brougham and Mackintosh brought all their eloquence to bear upon this case, bald as it was, in their endeavor to overturn martial law. Their words have been cited to the Court; but my friends on the other side forgot to state one fact, which might have some influence upon its opinion; and that is that upon a division of the House of

Commons, Brougham and Mackintosh were in a minority of forty-six, so that after a deliberate argument of many days, the great final tribunal of English justice decided that Mr. John Smith's case was rightly tried under martial law. I am free to say I should have decided otherwise if I could have had any voice in the matter, upon the ground that no necessity existed therefor. Indeed I think the criticism, which you will find upon this case in Mr. Cushing's opinion is the correct one, "that the whole case is so involved with the question of negro emancipation, as to afford but little light."

MACGUIRE'S CASE.

May it please your Honors, I have lived to see many things, and have almost learned not to be astonished at anything. But I must confess to a little surprise when I find deliberately cited on the relators' brief, as an authority, counsellor Prynn's argument in the case of John Macguire. Baron Macguire had led an insurrection in Ireland, and instead of being tried by the Irish Peers as by the Constitution of England he ought to have been, he was brought before the Courts of Westminster, and there tried by a jury of Middlesex, and Prynn takes to himself great credit that he got that unconstitutional thing done. But what of Prynn even is cited to your Honors? Fourteen years afterwards Prynn issued his argument in a catchpenny pamphlet—for they had those things then as well as now—and the advertisement of that pamphlet has been read to your Honors in aid of a great question of Constitutional law. I say I have lived to have seen many things and to be surprised at few, but I never heard before an adver-

tisement, of about the same value as an advertisement of a quack medicine, brought before a Court in a Constitutional argument.

I shall not stop, may it please your Honors, to answer the argument of my learned friend [General Garfield] drawn from the law-abiding, liberty-loving, oath-respecting conduct of the Confederate States during the late war. He insists that your Honors should govern your action by what the rebels have done in regard to the writ of *habeas corpus*. If he is in love with the despotism which ruled the rebellious States for the last four years, I am not, and I had rather contemplate his gallant actions in the field in overthrowing that despotism, than applaud his arguments in the forum drawn from its acts.

CONGRESSIONAL LEGISLATION.

I am obliged to him, however, for bringing to your attention the fact, that in the civil appropriation bill of 1865, Congress refused to pass an act which would throw any discredit on Military Commissions, or limit their action wherever a rebel or a traitor, secret or open, was to be found upon whom their jurisdiction should operate. If such tribunals for such purpose were not lawful in the judgment of the House of Representatives; if Military Commissions had no place in the laws of the land, why the necessity of an act of Congress to repeal them? If they are wholly void, unknown to the law, if they deserve the strong objurgations of my friend who last closed for the relators, why the necessity of an act of Congress to stop them? The fact is, Congress expressly refused to say that these Commissions, which it had many times before recognized as established, should be overthrown. I am obliged

to my friend for bringing this great fact to the judicial notice of the Court. It is true the gifted, talented, honest, pure-minded statesman, Winter Davis, offered such a provision in his zeal for a client who had come to grief through a Military Commission and its jurisdiction.

THE JUDGMENT OF THE LAST TRIBUNAL.

Mr. Davis' feelings became so interested for his client, that, like other members of the bar, he flew to Congress to get a law to meet his case; and, although in eloquent and forcible language he found cause to dissent from Military Commissions, yet, at the same time, he dissented from the administration of the great and good man whom even the severe terrors to evil doers of Military Commissions could not save from assassination, so that in November 1864, he caused this whole question of the exercise of military powers by the Executive; of military arrests, aye—I do not shrink from it my brothers—even "the tinkling of the little bell," to be submitted to the people of the United States, the highest arbiter at last over all, and they, by a unanimity unparalleled, decided in favor of such jurisdiction. I say then, Congress had decided the question of Military Commissions, military arrests, and military power, an appeal was taken to the people, and the President of the United States was sustained by the almost unanimous judgment of all loyal people. Oh! that fear of a Military Commission had been in full force, and the full rigor of martial law had put its restraining hand over this capital in April 1865, so that Abraham Lincoln might still be with us!

I do not exactly appreciate one portion of the argument of my brother. He says that martial law cannot be a law because it is all compelling; because it is a dire necessity; and he likens it to an earthquake that none can resist. What is law? At the risk of being elementary, I will endeavor to define it. Law is a rule of action, and I respectfully submit, adopting the gentleman's figure, that if an earthquake were now shaking this building to its foundation, that earthquake would be the rule of action for all of us for the time being. I have no doubt that the raining of the red hot lava upon Herculaneum and Pompeii was the highest, the supreme law, in those cities during the time when the shower was falling, and not to be overridden by my learned friend's constitutional argument if he had been there to oppose it with his logic.

A PROCLAMATION OF MARTIAL LAW NOT NECESSARY TO ESTABLISH IT.

Your Honors will observe that we have not put another element into our definitions of martial law. The common idea is, that martial law cannot exist until it is proclaimed. The proclamation of martial law, it is respectfully submitted, has nothing to do with the law itself. The law supervenes from necessity; the proclamation is but the ordinary, just, and proper exercise of the power of martial law, to notify the people over whom it shall have sway, that it is to be enforced, in order that they may govern themselves accordingly. Proclaiming martial law, when the necessity does not exist, does not enact martial law. When martial law does exist from the necessity of the case, it needs no proclamation to enforce it. I might elab-

orate this, but the waning hour admonishes me to proceed. Martial law comes from necessity. The moment the necessity exists, that moment it must be put in exercise. I will give you an example, by way of illustration, in a moment, upon another part of the case. For instance, a camp may be governed without martial law, under military law, nobody being in the camp except those who are responsible to the rules and articles of war. But a mutiny breaks out in that camp or on board ship; it is necessary to shoot the ringleaders of the mutineers; must one stop and declare martial law, before one can shoot a mutineer that comes toward him with a fixed bayonet? May you not at once shoot him, justified by the necessity which declares the law? Such is martial law. This law, resting upon necessity, is co-extensive with the necessity; begins when the necessity begins; ends only when the necessity ends in the judgment of him who has the power to enforce it, in the absence of any legislative action by the supreme legislative authority of the state.

These several kinds of law are referable in their adjudication to distinct tribunals. Infractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations, or in some special cases under the prize law by prize courts. Offences against military law are determined by tribunals established by the acts of the legislature which create that law, such as courts martial and courts of inquiry. The officer executing martial law, however, is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it, and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the offender.

THE NECESSITY WHICH CREATES MARTIAL LAW GIVES POWER TO EXECUTE IT.

The necessities and facts of warlike operations which create the law, also give the powers incidental to its execution. It would be impossible for the commanding general of an army to investigate each act which might be supposed to interfere with his movements, endanger his safety, aid his enemy, and bring disorder and crime into the community under his charge. He must, therefore, commit to his officers, and in practice to a board of officers, as a tribunal by whatever name it may be called, the charge of examining the circumstances, reporting the facts in each particular case, and of advising him as to its disposition, the whole matter to be then determined and executed by his order. Here let me speak incidentally of what are known in military law as Provost Courts, held by a Provost Judge, preferably a staff officer of the general commanding, who sits instead of, in aid of, or by the authority of, the general commanding, so called from the old Norman French, *pro voster*, an officer who deals with minor offences such as the General does not think it worth while to trouble a Military Commission with, or to try himself. Thus we get the establishment of the Provost Court, which follows every army, and is simply the Police Judge, if you please, executing the law declared by his commander, and punishing infractions of order by civilians, and the minor civil offences of soldiers not within the purview of the Articles of War.

FROM LIKE AUTHORITY ARE MILITARY COMMISSIONS DERIVED.

Hence, we say, arise Military Commissions, to investigate and determine, not offences against military law by soldiers and sailors, not breaches of the law of war by belligerents, but the quality of acts which are proper subjects of restraint by martial law.

Your Honors listened yesterday, to a eulogy upon one who needed none, especially from that source—a eulogy upon WASHINGTON. I will not repeat it, but simply call your attention to the fact, that it was pressed upon you that Washington never ordered Military Commissions; that Washington always respected the right of the citizen to be tried by jury; that the great and good Washington, as a Military Commander, always subordinated himself to the civil law.

MILITARY COMMISSIONS UNDER WASHINGTON.

I hold in my hand the record of the first Military Commission of which there is any record upon the continent. This sat by command of General Washington. Its proceedings were published by order of Congress, and is entitled as follows:

ANDRE'S CASE.

"Proceedings of a Board of General Officers, held by order of his Excellency, General Washington, commander-in-chief of the army of the United States of America, respecting Major Andre, Adjutant General of the British Army, September the 29th, 1780, at Tappan, in the State of New York."

Let me see what these proceedings were.

"Present, Major General Green, President; Major General Lord Stirling, Major General St. Clair, Major General St. Clair, Major General The Marquis de la Fayette, Major General Howe, Major General The Baron de Steuben,

Brigadier General Parsons, Brigadier General Clinton, Brigadier General Knox, Brigadier General Glover, Brigadier General Patterson, Brigadier General Hand, Brigadier General Huntington, Brigadier General Starke, John Lawrence, Judge Advocate General.

Major Andre, Adjutant General to the British Army was brought before the Board, and the following letter from General Washington, to the Board, dated Head Quarters, Tappan, September 29th, 1780, was laid before them and read."

This was the accusation, this was the "presentment by grand jury" of that day, under General Washington, who "always respected trial by jury."

"GENTLEMEN: Major Andre, Adjutant General to the British Army, will be brought before you for your examination. He came within our lines in the night, on an interview with Major General Arnold, and in an assumed character; and was taken within our lines, in a disguised habit, and with a pass under a feigned name, and with the inclosed papers concealed upon him. After a careful examination, you will be pleased, as speedily as possible, to report a precise state of his case, together with your opinion of the light in which he ought to be considered, and the punishment that ought to be inflicted. The Judge Advocate will attend to assist in the examination, who has sundry other papers relative to this matter, which he will lay before the Board.

"I have the honor to be, gentlemen,

"Your most obedient and humble servant,

G. WASHINGTON.

"The Board of General Officers convened at Tappan."

This was no court martial; there was no order for them to adjudicate, and if guilty, sentence; they were simply to report the facts for the action of the commanding general, and here is their report:

"The Board having considered the letter from his Excellency, General Washington, respecting Major Andre, Adjutant General to the British army, the confession of Major Andre, and the papers produced to them, REPORT to his Excellency, the commander-in-chief, the following facts, which appear to them relative to Major Andre:

First, That he came on shore from the Vulture sloop of war, in the night of the twenty-first of September instant, on an interview with General Arnold, in a private and secret manner.

Secondly, That he changed his dress within our lines, and under a feigned name, and in a disguised habit, passed our works at Stony and Verplank's

Points, the evening of the twenty-second of September instant, and was taken the morning of the twenty-third of September instant, at Tarry Town, in a disguised habit, being then on his way to New York, and when taken, he had in his possession several papers, which contained intelligence for the enemy.

The Board having maturely considered these facts, DO ALSO REPORT to his Excellency, General Washington, that Major Andre, Adjutant General to the British army, ought to be considered as a spy from the enemy, and that agreeable to the law and usage of nations, it is their opinion, he ought to suffer death."

Here, it will be seen, there was no sentence; no finding; only a report of facts to General Washington, and then Washington issued the order, in virtue of his authority as commander and chief, which condemned Andre to death, one of the most important acts in the Revolution. As an advocate of Military Commissions, therefore, I agree to all the eulogies which may ever be pronounced on Washington.

But we do not stop there. This may be said to have been the exceptional case of a spy. My brother Garfield, *ore rotundo*, with fine declamation, said to you that it was to the honor of the American name that no spy had ever been known among the Americans until this war, and it being likely there would be some now, Congress passed a law for the punishment of American citizens as spies.

Mr. GARFIELD. I said there had never been any law before considering an American a spy; I did not say there had not been an American spy.

Mr. BUTLER. I am bound to accept the gentleman's amendment. He perhaps overlooked the reason why, never before, there had been any law punishing an American as a spy. It was that if an American was a spy, he was a traitor and could be punished for treason; if a foreigner was a spy he could be punished as a spy, and therefore there was a law, i. e. martial law, to take care

of spies lurking "about the camp." But we were not powerless even with regard to traitors who were spies. There was a law for them, even in the time of the Revotion. I read from the second volume of Lossing's Field Book of the Revolution:

PALMER'S CASE.

"The name of the spy was Edmund Palmer. He was an athletic young man, connected by nature and affection with some of the most respectable families in West Chester, and had a wife and children. He was arrested on suspicion, and enlisting papers, signed by Governor Tryon, were found upon his person. It was also ascertained that he was also a lieutenant in a Tory company. These and other unfavorable circumstances, made it clear that he was a spy, and on that charge he was tried, found guilty, and condemned to be hung. His young wife pleaded for his life, but the dictates of the stern policy of war made Putnam inexorable. Sir Henry Clinton sent a flag to the American commander, claiming Palmer as a British officer, and menacing the Republicans with his severest wrath if he was not delivered up."

Every man remembers General Putnam's answer:

"HEAD QUARTERS, 7th August, 1777.

"SIR—Edmund Palmer, an officer in the enemy's service, was taken as a spy, lurking within our lines. He has been tried as a spy, condemned as a spy, and shall be executed as a spy, and the flag is ordered to depart immediately. ISRAEL PUTNAM.

P. S. He has been accordingly executed."

Does my brother now really think there was not any law for American spies about that time? Edmund Palmer was undoubtedly of a different opinion.

CASE OF JOSHUA HETT SMITH.

But I do not stop there. To give you an idea of what that great and good man General Washington thought of the rights of military commanders in the field, I call your attention to the trial of Joshua Hett Smith. Smith, you may remember, was the man at whose house Arnold and Andre met. He was taken and tried by a military Court for treasonable practices. The civil courts were open at

Tavrytown at that time; the British Constitution as adopted by our colonial fathers extended over him, but still Washington tried Smith by a military Court. You will find in 2nd Chandler's Criminal Trials, page 248, the account he gives of his interview, when he was first brought before Washington, to which I call your attention, in order that the Court may understand how the Father of his Country regarded the extent of his powers as military commander. Smith says:

"After as much time had elapsed as I supposed was thought necessary to give me rest from my march, I was conducted into a room, where were standing General Washington in the centre, and on each side General Knox and the Marquis de la Fayette, with Washington's two aids-de-camp, Colonels Harrison and Hamilton. Provoked at the usage I received, I addressed General Washington, and demanded to know for what cause I was brought before him in so ignominious a manner? The General answered sternly, that I stood before him charged with the blackest treason against the citizens of the United States; that he was authorized, from the evidence in his possession, and from the authority vested in him by Congress, to hang me immediately as a traitor, and that nothing could save me but a candid confession who in the army, or among the citizens at large, were my accomplices in the horrid and nefarious designs I had meditated, for the last ten days past."

I want now to call your Honors' attention to the argument of the late Attorney General of the United States, that in civil courts the Constitution did not allow any pressure to be brought upon a man to make him confess, at the same time that he eulogises the military conduct of Washington. The great and good Washington said to Joshua Hett Smith, "confess who your accomplices are or I will hang you immediately." The necessity when the whole fate of his country depended upon that quick action, justified him to the mind of everybody, but those who, as described by a namesake of mine,

"N'er felt the halter draw,
With good opinion of the law."

"I answered," says Smith, "that no part of my conduct would justify the charge, as General Arnold, if present, would prove, that what I had done of a public nature was by the direction of that General, and, if wrong, he was amenable, not me, for acting agreeably to his orders." He immediately replied, "Sir, do you know that General Arnold has fled, and that Mr. Anderson, whom you have piloted through our lines, proved to be Major John Andre, the Adjutant General of the British army, now our prisoner? I expect him here, under a guard of one hundred horse, to meet his fate as a spy, and, unless you confess who were your accomplices, I shall suspend you *both* on yonder tree, pointing to a tree before the door. He then ordered the guards to take me away."

One would think we had just read an account of the arbitrary act of some over zealous General in this war, dealing with a southern traitor; but I am really reading you an account of what was done by that great and good and glorious man George Washington.

THE WHISKEY REBELLION.

My brother pressed again upon the Court the fact that Washington was so careful of the rights of the citizens of Pennsylvania, in the whiskey rebellion, that he marched with his troops in person, to see that the insurgents took no detriment. My brother differs with John Marshall, who, on the 342nd page of the 2nd volume of his Life of Washington, gives an account of that rebellion, which I will read:

"The President, in person, visited each division of the army; but, being confident that the force employed must look down all resistance, he left the Secretary of the Treasury to accompany it, and returned himself to Philadelphia, where the approaching session of Congress required his presence."

I certainly shall not take up cudgels in behalf of the accuracy of John Marshall, but leave him and my brother to settle the question between them; but as the whiskey

insurrection is cited as a reason why martial law should never be declared, because Washington did not find it necessary then to declare it, I call your Honors' attention to the fact that the reason why he did not even march with his troops, was that he had a force which could look down all resistance.

THE MUTINY IN THE PENNSYLVANIA AND NEW JERSEY LINE.

But when there was need of it, let us see how he dealt with men who came under the provisions of martial law. You may remember, and I call the special attention of my friend the late Attorney General of the United States, [Judge Black] to the fact, that the Pennsylvania line revolted largely in the revolutionary war. I think it is but fair to allow me to refer to that, as he spoke of the Hartford Convention and of the action of Massachusetts in the war of 1812. Neither of us, I will venture to say, approve of the action of our compatriots on either occasion. Marshall says Washington, who had been extremely chagrined at the mutiny in the Pennsylvania line

"And who was now assured of the confidence and fidelity of the *eastern* troops who were composed of natives, determined by strong measures to stop the further progress of a spirit which threatened the destruction of the army, and ordered a detachment to march against the mutineers to bring them to unconditional submission. General Howe, who commanded this detachment, was instructed to make no terms with insurgents while in a state of resistance, and as soon as they should surrender to seize a few of the most active leaders and to execute them on the spot. These orders were promptly obeyed and the Jersey mutineers returned to their duty."

I ask for no higher authority. We had the articles of war of the confederation at that time. He was bound, in the language of the late Attorney General, to try these Jersey and Pennsylvania mutineers by court martial, by

an "ordained court." You can almost hear the echoes of his voice crying out for an "ordained court" among the arches of this Hall. But General Washington ordered them to be executed on the spot; he waited for no "ordained court," because the necessity required that mutiny should be put down, as we say in this case, necessity requires that traitors shall be seized belonging to the order of American Knights or Sons of Liberty.

MARTIAL LAW IN THE MEXICAN WAR.

Martial law and its tribunals have come to be recognized in the military operations of all civilized warfare. Washington in the Revolutionary war, as we have seen, had repeated recourse to Military Commissions. Jackson in Florida tried Arbuthnot and Armbrister; and when his Military Commission, as it was said, advised that one of them should not be executed, he drew his pen through the advice. Scott had to use them in Mexico frequently; and you will find in the second volume of his autobiography a somewhat characteristic account of the reasons why he issued the order for martial law in Mexico, and also the attempts he made to get it declared by the government at home. I read from page 393 of that volume:

"To suppress these disgraceful acts abroad, the autobiographer drew upon elaborate paper, in the form of an order—called his *martial law order*—to be issued and enforced in Mexico, until Congress could be stimulated to legislate on the subject. On handing this paper to the Secretary of War (Mr. Marcy) for his approval, a *startle* at the title was the only comment he then, or ever made on the subject. It was soon evidently returned as too explosive for safe handling. A little later the Attorney-General called (at whose instance can only be guessed) and asked for a copy, and the law officer of the Government, whose business it is to speak on all such matters, was stricken with legal dumbness. All the authorities were evidently alarmed at the proposition to establish martial law, even in a foreign country, occupied by American troops."

I have had an acquaintance for some years with the gentleman who was Attorney General of Mr. Polk's administration at that time; and I have never known him "to be struck with dumbness" at any legal proposition that was ever presented to him; he usually sets himself diligently to work to deal with it and decide upon it. I am inclined to think, therefore, that in the querulousness of age, and in the vaingloriousness of fighting his battles o'er again, General Scott has somewhat forgotten the occurrences which took place between him and the government in relation to the declaration of martial law in Mexico. There are those living, however, who can speak to this better than can I.

Under the order of General Scott, seventeen Irishmen were executed on a single day for desertion, after trial, not by court martial but by Military Commission. By Military Commissions citizens were tried and they were executed; officers were tried for burglary, robbery, everything not within the articles of war. The articles of war do not provide any punishment for anything that a soldier may do to a citizen, with a few unimportant exceptions; and therefore Military Commissions were necessary to adjudge soldiers for crimes outside of the articles of war. To meet these omissions in the articles of war, was one purpose which induced General Scott to issue his order to which I have called your attention.

MILITARY COMMISSIONS FAMILIARLY RECOGNIZED BY CONGRESS.

In the next place, Military Commissions are familiarly recognized, in express terms, by several acts of Congress. I say "familiarly recognized," for they are recognized as

existing things. The 5th section of the act of Congress, approved July 17th, 1862, provides:

"That the President shall appoint, by and with the advice and consent of the Senate, a judge advocate general, with the rank, pay, and emoluments of a colonel of cavalry, to whose office shall be returned, for revision, the records and proceedings of all courts-martial and Military Commissions, and where a record shall be kept of all proceedings had thereupon. And no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President."

The Court will see that the act of Congress recognizes a Military Commission as a thing well known to the military law.

A Military Commission, for a different purpose, was recognized by the joint resolution, approved March 11th, 1862, which provides:

"*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled*, That all sums allowed to be due from the United States to individuals, companies or corporations, by the Commission hertofore appointed by the Secretary of War, (for the investigation of military claims in the west), composed of David Davis, Joseph Holt, and Hugh Campbell, now sitting at St. Louis, Mo., shall be deemed to be due and payable, and shall be paid by the disbursing officers, either in St. Louis, or Washington, in each case, upon the presentation of the voucher with the commissioners' certificate thereon, in any form, plainly indicating the allowance of the claim and to what amount. This resolution shall apply only to claims and contracts for service, labor, or materials, and for subsistence, clothing, transportation, arms, supplies, and the purchase, hire and construction of vessels."

Here the Secretary of War undertook to deal with the rights of property through a Military Commission, and I shall certainly not argue against the fitness of the persons who were appointed, and I believe their decision was satisfactory to every body but the rogues, whose claims they rejected. If a Military Commission can deal with the rights of property, it can with the rights of liberty. Property is as much covered as liberty by constitutional

guards. It may be said—for the criticism has been made in another place, by somebody who argued that those who assassinated the President, could not be tried for it by a Military Commission in his own camp—that this Commission was but to audit the claims of persons against the United States. The United States civil law has auditing officers; has a whole machinery to audit claims. A Military Commission to audit claims against the United States is as much a usurpation as is a Military Commission to take a man's life, if either is usurpation at all.

Again: In the act of March 3rd, 1863, chapter 75, section 38, Military Commissions are recognized:

"That all persons, who, in time of war or rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or *elsewhere*,"—

And that is the whole point of that section; there had always been a law against spies lurking about forts and fortifications, but the best place for a spy in this war, was in New York City, so far as my experience goes, to obtain information. It was provided there, that the spy might be brought to trial there for his crime, a proceeding for which there was before no law,—

"Or *elsewhere*, shall be triable by a general court martial or Military Commission, and shall, upon conviction, suffer death."

In my judgment the act was not passed because there had never been a law about spies before in the American government, but it was to punish those who were "elsewhere" than in the camps and fortifications.

THAT WHICH IS NO OFFENCE IN THE EYE OF THE CIVIL LAW, IN TIME OF PEACE, MAY BE A VERY GRAVE CRIME IN TIME OF WAR, IN THE EYE OF MARTIAL LAW.

Thus far, may it please your Honors, we have proceeded upon the proposition that there is such a power as martial law. Perhaps your Honors will pardon me if I examine for a moment some few cases of its execution, in order that you may see the effect of this law, and also see the matters of which martial law takes cognizance; that they are more varied in range, more important in results, and require other and different animadversion, from that which the civil law can give. Acts that are trivial, or even inoffensive in the eye of the civil law, are vital in war, even to the safety of armies and communities. Let me illustrate the difference with which the civil law looks upon some acts, in comparison to the importance with which the civil law invests the same acts and their consequences.

MUMFORD'S CASE AT NEW ORLEANS.

A man sees a small piece of woolen cloth, of variegated colors, swinging in the wind from a pole on the top of a building not his own, and under a claim of right, at noon day, in the view of thousands, he enters upon the premises, takes it down, carries it away, and appropriates it to his own use. What crime is that, what offence even, against the civil law? Methinks I hear my learned brothers say, in their zeal for civil law and for civil rights, that it is but a trespass, the breaking a close, and that carrying away the fabric only aggravates the trespass, and the whole can be atoned for by a small fine and damages. They are right; it is but a trespass of the smallest mo-

ment; but let us see how martial law looks upon the act. A public, civil, territorial war is raging; a fleet has passed the forts and outer defenses of a city, under a fire more concentrated and terrible than ever yet was poured upon wooden ships—an enterprise that only a Farragut could have conceived or successfully led. The victorious vessels lie before the great commercial metropolis of one of the belligerents; their guns, loaded with shell and death-dealing grape, are trained upon the streets and public buildings. A surrender is demanded; and the mayor who is but a civil officer, replies that he cannot surrender, he has no power as a civil officer to surrender the city, but as the city is wholly at the mercy of the conqueror, he may raise his country's flag upon the country's public buildings, in token that the city can no longer resist. The proposition is accepted, and the stars and stripes float out once more in proud triumph over the public buildings of the United States, in token of the restoration of the authority of the United States, its power, its dignity, its sovereignty. The christian naval commander, in grateful thankfulness to God for the victory which has been given to his country, so nearly bloodless, calls his sailors together in either ship, to render thanksgiving and praise to Him for His mercy. To prevent surprise, lest the enemy should return, a watch is set upon the tops of the sloop-of-war Pensacola, to see that no man shall haul down that flag, and two small howitzers are trained upon the flag staff. These are to be fired, as signal guns, of the return of the enemy, and then these gallant crews are to rush to their guns to renew the deadly strife.

All is quiet repose in the fleet; no sound is heard except the murmur at the hatchways of ascriptions of praise to

the Lord of Hosts by His children, rough sailors though they be, for His mercy that He has spared them in battle and in tempest and in sudden death. But hark! the signal guns are fired, the enemy have returned; the flag is hauled down; the city no longer surrenders; the contest is renewed; each sailor rushes to his guns, each gunner pulls instinctively as thought the lanyard which discharges it. What shall save this city from a storm of hurtling shot and hissing shell, brought on it by a few of its insane citizens. An overcast sky threatening rain has caused a careful Ordnance officer to remove the priming-wafers from the vent of the guns, the locks give no answer, and time is given for discipline to resume its sway. What has happened is appreciated. A small band of rascally, riotous, rebellious traitors, led by a drunken gambler, have torn down the flag and are amusing themselves with trailing it in the dust about the streets and tearing it in pieces with fiendish joy; and thus a "little cloud no larger than a man's hand," in the hands of Him who directeth all things well, has saved a city from a storm of fire almost as terrible as that which the divine wrath reigned on Sodom, ah! even from the dread consequences of the insane acts of its wicked citizens.

A few days afterward that city is garrisoned by Union troops, and the defiant rebel, the desecrator of his country's flag, the provoker of the bombardment of his own city, walks the streets, defiantly wearing at his breast a shred of his country's banner which he has trailed in ribald mockery in the dust. We have seen how the civil law looks upon the flag, as a piece of bunting, to be paid for at so many cents per yard if it is taken and appropriated to one's own use, unless indeed the taking down be an overt act of treason.

But to the soldier his banner has a high and noble significance. To him it is the symbol of protection, authority and power. It is the emblem of his country's glorious memories of the past and bright hopes of the future. On its folds he sees emblazoned the great deeds of patriot heroes who have gone before, for his reverence, his devotion, his worship. Sacred to his love, endeared to every emotion, he will follow it as the pillar of cloud by day and the pillar of fire by night. He will fight that it may be triumphant and honored. He will brave death and wounds that it may not be dishonored; and dying he asks no richer shroud than its folds, and desires that he may be followed to the grave by the music to the sound of which he has followed it in victory, and that his last requiem may be the volleys of his comrades which he has heard in its defense in life. Whosoever honors the soldier's flag, warms his friendship; whosoever salutes it, kindles his pride; whosoever fires upon it, rouses his patriotism; whosoever lowers it, shames his manhood; whosoever disgraces it, shall feel his merited vengeance.

The navy will take other cities and other rebellious towns upon the long line of river which drains a continent and bring them under their guns. They will raise other flags, in token of submission to the power of the Government, of its rebellious citizens. Shall every infuriated mob, fired by the pernicious example, undeterred by the swift punishment which should follow, be at liberty to devote peaceful communities to destruction, and to desecrate again the sacred symbol of the nation's sovereignty. The tearing down of the flag at New Orleans, was the greatest military crime which could be committed in the face of a conquering army. We are sustained in this opinion by

the declaration of six major generals, four of whom were educated at the national military school, and one Secretary of the Treasury, who in various forms of phrase have declared, that whoso pulls down the American flag, let him be shot upon the spot. One General who had never said anything upon the subject, saw to it that the dignity, the honor, the justice of his country was vindicated. The offender was arrested, tried by Military Commission for military treason, and suffered the ignominious death of a traitor. His execution was an act of humanity to defenseless communities in the future operations of war; an act of justice to the nation, whose sovereignty he had defied, and a needed example to all other rebellious traitors in like case offending.

CLARY'S CASE AND FIVE BURGLARS.

Pardon me, your Honors, if I take another example, for we can illustrate better by example than by argument, the necessity of the exigencies of public affairs, calling for prompt action, when the "foundations of the great deep" of civil law are broken up; when society itself is disorganized; when bad passions are let loose, and when the strong arm only can stay the floodgates of crime.

In the same city, another person, connected with the service of the United States, in almost household relations with the commanding general, disguised himself in the uniform of a United States officer, took to himself five burglars, two discharged soldiers of the army, and three thieves of the city, bound them together in a sworn band with horrid oaths,—a branch, for aught I know, of the American Knights,—and then, in the disguise of a detail of United States soldiers, with a forged pass from the

commanding general to search the houses of peaceable citizens for arms and munitions of war, committed eighteen burglaries in three days, in the night-time, robbing men, women, and children, of thousands of dollars. But the sure swift hand of military justice overtook this band of midnight marauders. Arrested in the morning, tried during the day, found guilty upon their own confession, the stolen property restored, they were condemned to execution as an example; as a token that the strong arm which had struck down in that city one of the enemies of the United States, for a crime against the military power and justice of the United States, would follow any other criminal who should commit grievous offences against the citizens. The city assembled to witness an act of swift, just retribution, and to bow in reverence to the power of the government which was extending its protecting hand over them. And from that hour, neither incendiary fire, nor robbery by violence, nor burglary, nor rape, nor assassination, nor murder by knife or by poison, reminded that people of any tendency to return to their former rule of civil law; and thereafter, by day or by night, a woman, nay more, a hated Yankee, in the person of the chief executive officer, could, and did, walk alone and unmolested the length of the city, from Chalmette to Carrollton. Can any one say as much of Washington on the 14th of April, 1865, when the Supreme Court was sitting under the dome of the Capitol, dispensing civil law? This furnishes to your Honors an example pregnant with much food for thought, that by martial law, strictly and justly enforced, protection to life, liberty and property was extended in a hostile city, in time of civil war, whose fair name had been tarnished by deeds of ruthless violence to as full an

extent as all the constitutional guards can throw around the citizen in the most loyal, tranquil state; a law for which the motto of my beloved commonwealth might not be inappropriate: *Ense petit placidam sub libertate quietem.*

THE REMEDY FOR THE ABUSE OF THE POWERS OF MARTIAL LAW.

Your Honors may ask me, as indeed has been asked by the counsel on the other side, what redress shall any citizen have if this power, so great, so terrible, and so quick in its effects, is abused? The same and only remedy that you can have whenever power is abused. If that power, under martial law, is used for personal objects of aggrandizement, or revenge; of taking one dollar from any citizen for any use except that of the government; of imprisoning, one hour, any citizen, except when necessity under fair judgment demands, he ought to have an appeal to the courts of the country after peace, for redress of grievance. Such rightful liability of a commander, abusing his power, is one from which even the judges upon the bench are not exempt, when they colorably use power for purposes of oppression.

I speak for every officer in the army—one I know—when I say, that they are willing, nay, desirous, that every act of their administration of military and martial law shall be brought to that test, and decided by the highest tribunal. We will bow to the law when we are under the law, whether it is martial or civil law.

AN EXAMPLE OF THE NECESSITY OF MARTIAL LAW TO PROTECT POPULAR RIGHTS.

It has been said that martial law, and its execution by trials by Military Commission, are fatal to liberty and the

pursuit of happiness; that under it labor cannot thrive, property is not secure, persons are not protected; that it is but another name for anarchy, tempered by despotism. We have pointed to us the example of the Fathers, in the constitutional guards they threw around the rights of the citizen, as a triumphant argument that they are needed, that legislative enactment is requisite to protect his rights; but I emphatically call upon the court to take notice of the fact, as a part of the history of the country, now being lived and written among us, over part of which only the courts yet dispense justice, except by the aid of the military arm, that on Military Commissions, on the military power, and on the salutary fear of its exercise, four millions of people, within the bounds of the territory of eleven rebellious States, depend to-day for all they have of hope for the receipt of the rewards of labor, or protection of their person from outrages so horrible that the mind revolts from their contemplation, aye, even for life itself. And you are called upon here, in this very temple of justice to decide, that the last refuge of these people, whose whole lives are at once the evidence and exemplification of wrong, shall be overthrown and subverted, and that the last hope of justice shall be taken away altogether. Not daring to bring into this presence any political thought which should influence the legislators on either side of us, yet I take leave, as an illustration, to put it to the honor and conscience of every judge upon the bench, whether he believes that if the power to hold Military Commissions is decided against, and they and the fear of them are withdrawn in the revolted section of the country, any considerable portion of the people of that section, who have been

loyal can, by recourse to the civil law, get those rights and those liberties, and that protection for property, which should be accorded to the humblest citizen.

IF THE POWER OF MARTIAL LAW BE NOT INVOKED, IN CASE OF MILITARY NECESSITY, BY THE LAW, MOB LAW OR ANARCHY ENSUES.

Example will teach us another thing. We beg to call the attention of the court to the fact that, we are only asking for the exercise of military power, when necessity demands and prudence dictates; when the civil law is powerless to redress wrongs, to preserve rights, to ensure safety and tranquility to the country. When the civil law fails to do that, and when its execution becomes lax to a considerable degree, if there is no intervention of military power to right wrongs and punish crime, an outraged community will improvise some tribunal for themselves, whose detection shall be as unerring, whose judgments shall be as certain, whose execution shall be as swift, and whose punishments shall be as terrible, as any exhibition of military power. We are not without such examples in this country, and I need but pause in this discussion to call your Honors' attention to the organization of vigilance committees in San Francisco, on the Pacific coast, when civil law failed to do its duty. There is an example that necessity compelled the law to restore order and punish crime, and so we shall find the law is universal, that necessity compels some tribunal to execute justice.

THE TENDENCY OF LEGISLATION TO EXPAND, RATHER THAN TO LIMIT, MILITARY JURISDICTION.

Passing rapidly, in the waning time, to the next proposition, I submit that the acts of Congress by no means give authority to Military Commissions, they only recognize

them; and assuming their jurisdiction and that it was proper and fit to be exercised, Congress has endeavored to extend that jurisdiction over other classes of crimes beyond the pale of mere military authority. We are not bound to argue, nor do we argue, the question, whether Congress has that right; because we by no means here claim specially under an act of Congress applicable to cases happening outside of the theatre of military operations, because the crimes at bar, took place according to the record "within the theatre of military operations," "within the military lines of the army," "within a State constantly threatened with invasion."

As the war progressed—being a civil war and not unlikely, as the facts in this record abundantly show, to break out in any portion of the Union, in any form of insurrection—the President as commander-in-chief, by his proclamation, ordered the *habeas corpus* during the existence of the rebellion to be suspended, and ordered further:

"That during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by court-martial or military commission."

This was the proclamation of September 24th, 1862, and you are called upon this day to say whether the President had a right to issue such a proclamation, because we say that it was within his powers. This proclamation, which by its terms was to continue during the then existing rebellion, was in full force during the pendency of the proceedings complained of, and has not been annulled by any counter proclamation, treaty, or law, of Congress.

While we do not claim that any legislation of Congres was needed to sustain this proclamation of the President, it being clearly within his power as commander-in-chief, to issue it; yet if it is claimed that legislative action is necessary to give validity to it, Congress has seen fit expressly to ratify this proclamation by the act of March 3d, 1863, which declared that

"During the present rebellion, the President of the United States, whenever in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof;" and also declared by the same act that the order of the President should be a full justification, [not excuse,] to any person acting under his order, in any court of justice.

THE WAR POWER OF THE EXECUTIVE.

I have said that the right to issue such a proclamation was within the power of the President. That, I think, has been decided by this court in the case of Brown v. the United States, 8 Cranch, 153. I read from the opinion in that case:

"When the legislative authority, to whom the right to declare war is confined, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discretion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President."

To suspend this writ is one of the means of executing war, and without the wise exercise of it I do not believe that we should have been allowed to quietly discuss this case here this day. Afterwards, in accordance with the act of Congress, which I have read, the President, by his proclamation of September 16, 1863, suspended the writ. Your Honors have decided in the prize cases, that the time

when the insurrection ripened into war, and its duration, are matters of which the court will take judicial notice, and you have also decided in a series of decisions, which I need not read, that upon all these political questions the court will follow the political branches of the government, namely, the President and Congress, or either that may have jurisdiction of the subject matter, and their decision is to be valid and binding and cannot be reviewed; because if this court can say whether the exigencies of carrying on war require the suspension of the writ of *habeas corpus* or not, or whether they require the exercise of martial law or not, whether Military Commissions are necessary or are not in a given case, then every court, district and state, has the same power whenever it issues a writ of *habeas corpus*. Indeed, I see that in Fink's case, the judge of some court in Pennsylvania has undertaken, on a writ of *habeas corpus*, gravely to decide that last July the rebellion had come to an end, and that, therefore, a man could not be held any longer on his enlistment, because he only enlisted for and during the war. Your Honors appreciate the complete and thorough anarchy which attempting to take such a matter out of the decision of the President, by this court, would entail.

WHO MAY BE SUBJECTS OF MARTIAL LAW.

These petitioners, apparently supposing that the Military Commission might have jurisdiction in certain cases, allege that they never have been in the naval or military service since the commencement of the rebellion or residents of a rebel State, and therefore it is wholly out of their power to have acquired belligerent rights, and to have placed themselves in such a relation to the government as to

enable them to violate the laws of war. I think there is a very strong *non sequitur* in that part of the relators' petition. The petitioners say they have never been out of a loyal State and cannot have violated the laws of war. That might have been the plea of Edmund Palmer when Putnam got hold of him. That is the plea of every spy; that is the plea of every traitor, who is too cowardly to go and fight. The allegation covers nothing.

We submit that neither residence, nor propinquity to the field of actual hostilities, is the test to determine who is or who is not subject to martial law, even in time of foreign war, and certainly not in time of civil insurrection. The commander-in-chief has full power to make an effectual use of his force. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force, organized to assist the enemy; one who is preparing to seize arsenals and release prisoners of war, taken in battle and confined within the limits of his military lines. These crimes of the petitioners were committed in the State of Indiana, where their arrest, trial, and imprisonment took place, a State which had been and was then threatened with invasion, having arsenals which the petitioners plotted to seize, and prisoners of war whom they plotted to liberate. Its citizens were liable to be made soldiers and were actually ordered into the ranks, and to prevent their becoming soldiers, the petitioners conspired with and armed others. Can a case be stated where the judgment of the Executive might determine the question of the exigency arising to exercise martial law, if this case is not the one?

THE FACT OF THE COURTS BEING OPEN NOT A TEST.

The record does not present the question which was attempted to be raised before a military tribunal elsewhere; but the test which was submitted in the case of the Booth conspirators is also submitted here. All the courts were in session in the District of Columbia, and yet the Booth conspirators, and Wirz, were tried by Military Commissions; so that the fact of the courts being open is no test whatever. But the question raised in the case of the Booth conspirators was, whether for merely a civil crime, to wit: murder, a Military Commission could take cognizance. But these are more than civil crimes, they are military; they are holding communication with the enemy; conspiring with others to seize munitions of war, stored in the arsenals, and to liberate prisoners of war held for exchange, and organizing an armed force against the government. The petitioners are not less enemies because they are traitors, and not less traitors because they are enemies.

THE CASE OF THE BOOTH CONSPIRATORS.

Having alluded to the case of the Booth conspirators, I may be pardoned for stating the ground on which I think the jurisdiction of the Military Commission might have been sustained in that case, even as distinguished from this. The question there was, whether the commander-in-chief, succeeding to the command because his predecessor had been murdered, in his own camp, surrounded by his own guards, could inquire who murdered his predecessor, and punish the murderers; or must he send them to a grand jury, or to a justice of the peace? The statement of the question will be its sufficient argument.

THE CONSTITUTIONAL ARGUMENT.

Thus far, may it please your Honors, we have proceeded in the discussion without invoking any aid from the Constitution as enabling Military Commissions. We have grounded them upon the great laws of nations and of war, and it only remains for me to discuss whether or not the Constitution has any restraining clause upon the exercise of this so derived power. I must pass over this very hurriedly, because I hardly dare attempt even, to enlighten your Honors upon a question of constitutional law.

THE ORIGIN OF WAR MAKING AND WAR CONDUCTING POWERS.

Every sovereignty has within itself the power of peace and war, all the rights of government. The people of these States when they founded "a more perfect union, to provide for the common defence," vested the mode and manner of making and carrying on war in the general government. If they had stopped there, and put no constitutional limitations, all the powers of making and carrying on war would have been in the President, because they are *executive* powers, and in some of the States, as in Massachusetts, the powers of declaring war, and carrying on war, and raising troops, are in the Executive. But the people of the States adopting the Constitution, divided, but did not limit, these powers.

THE DIVISION OF THESE POWERS UNDER THE CONSTITUTION.

They gave to Congress the power of originating war by provoking it by letters of marque and reprisal, or by declaring it, when declaration was necessary to originate war. Therefore the people must of necessity give to Con-

gress the power of raising and maintaining armies and of employing the militia. Then to keep out of the hands of the Executive the "fruits of victory," so that after war was carried on, which by the rules of it might result in captures of broad lands, rich fields, and much wealth, to prevent the Executive disposing of them as he willed, the power was also given to Congress to "make rules for disposing of all captures by land or by water."

But to the Executive was entrusted the power, after war is originated, of conducting it. As to the manner, means, and appliances, by which war is carried on by civilized nations, all power is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration. To illustrate the necessity of such grant of power, by the case at bar. Your Honors can have no knowledge how extensive was this "Order of Sons of Liberty;" how extensive was the organization of these American Knights in Indiana. The Executive may know, as I can readily suppose he does know; and if I might step out of the record, I could say that I am aware that he did know, that this order claimed to have one hundred thousand men enrolled in it in the States of Indiana, Ohio, and Illinois, so that no jury could be found to pass upon any case, and any court house wherein it had been attempted to try any of the conspirators, would have been destroyed.

WAR BEING INAUGURATED, THE CONDUCTING POWER IS SUPREME IN THE EXECUTIVE.

Therefore, I say, the President, by the Constitution being made judge of the exigencies, the means and exertions, which, when war exists, should be put forth to carry

it on, has judged that in this exigency, a military tribunal alone could safely act. On this point we ask attention to Brown v. the United States, 8th Cranch, and to Luther v. Borden, 7th Howard. Both cases are familiar to your Honors; I have read from each, and I shall not detain you to read further. They decide that it is for the President to judge when any exigency has occurred which shall call upon him to put in execution the war powers which are vested in him by the government. In Martin v. Mott, in 12th Wheaton, it was expressly decided that the President had the sole power to judge on these very questions, and also that a court martial, which was in existence during the war, and remained in existence five years after the war, had a right to try offences which had been committed during the war. The court martial was instituted in time of war, and five years afterwards was trying offences; and this court held its action valid. This doctrine also, was a cotemporaneous construction of the Constitution by those good and wise men who framed it.

During war the President's powers must be without limit; because, if defending, the means of offence may be illimitable; if acting offensively, his resources must be proportionate to the end in view, to conquer a peace. Nowhere is this doctrine better stated than by Hamilton, in the Federalist, No. 23:

"The authorities essential to the case of the common defense, are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

Again, Madison says in the Federalist, No. 41:

"With what color of propriety, could the force necessary for defence be limited by those who cannot limit the force of offence?

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"It is in vain to oppose constitutional barriers to the impulse of self preservation. It is worse than in vain, because it plants in the Constitution itself necessary usurpations of power."

CONSTITUTIONAL LIMITATIONS OF THE WAR MAKING POWER.

Your Honors will do me the favor to observe, that by the Constitution, as originally adopted, there was no limitation whatever put upon the war making powers. By the subsequent amendments there was but one limitation put upon the war making power, and that was, that no soldiers should be quartered in any house in time of peace, being the same right substantially which was extorted from Charles 1st, by the Petition of Right. This is the only limitation imposed, and that was done after discussion, and after the country's attention had been drawn to the several powers granted to Congress. The Constitution, as originally adopted, only undertook to limit one incident of the war making power—the *habeas corpus;* and if limit it can be called, observe the way in which that writ is guarded. It is provided that the writ of *habeas corpus*, in *time of peace*, shall not be suspended; it shall only be suspended when, "in case of rebellion or invasion, the public safety requires;" that is, in time of war. It seems to be taken for granted by the Constitution, that the writ is to be suspended in time of war because very different rules must then govern. The language of the Constitution is, that it "shall not be suspended except," —showing that it was supposed that the war making power would find it necessary to suspend the *habeas corpus*, and yet no other guard was thrown around it.

It is claimed, however, that the 4th, 5th and 6th articles of amendment to the Constitution, are restraints upon the war making power. Can it be contended for a moment that the provision that the right of the people to bear arms shall not be infringed, will prevent the President from disarming, in time of war, any portion of the citizens that he thinks are conspiring against the public safety? Take these Sons of Liberty, who were armed against him secretly, would the Constitution prevent him from disarming them? Yet, the right to bear arms is as much granted by the Constitution as the trial by jury. Is it to be maintained that the President cannot, in time of war, exercise the right of searching and seizing the papers and persons and houses of insurrectionists, because the Constitution forbids it in the articles of amendment?

I call your Honors' attention to the fact, that in every discussion upon those articles of amendment, in every State of the Union, there never was a discussion upon the question what should be their effect in time of war; and yet every one knew, and must have known, that each article must be inoperative in some cases in time of war. If in some cases, then in all cases, we say, where "necessity demands it, the exigency exists and prudence dictates." Your Honors will see that there is no other way of construing constitutional provisions except by the maxim, *singula a singulis reddenda.* Each provision of the Constitution must be taken to refer to the proper time as to peace or war in which it operates, as well as to the proper subject of its provisions. For instance, the Constitution provides that "no person" shall be deprived of liberty without due process of law. The Constitution prescribes also, that representation shall be apportioned in a given

way, and that three-fifths of "all other persons" shall be counted to make up the basis of representation; and yet those "other persons" have been (as many as four millions of them at one time) deprived of liberty and property ever since the adoption of the Constitution, without any process of law. The very same words which describe my brothers' clients as "persons who having committed felony and other high crimes, fleeing from justice," describes persons who are fugitives from labor. The Constitution provides that no "person's" right to bear arms shall be infringed, and that no "person" shall be despoiled of life, liberty, or property, without due process of law. If you are going to stand on the letter of the Constitution, which has been so loudly declaimed for here, that no "person" can be tried without process of law, I say that men have been held to labor, imprisoned and deprived of their arms, without due process of law, although called "persons" in various provisions of the Constitution, and the word "slave" is nowhere there to distinguish them from other persons.

That these several articles of amendment are all in *pari materia;* all in favor of the safety of the citizen; all amendments of the Constitution, it will be observed, brought in after its adoption for the protection of the citizen, after the war powers had been granted; and in only one single place do they undertake to deal with any war power, and that is in the exception, wherein they expressly except persons in the militia, when called into action, in time of peace, not in time of war. We have, therefore, put it upon our brief that the 4th, 5th and 6th articles of amendment are the peace provisions of the Constitution. My brother Black was a little inclined to make

himself merry at this suggestion ; indeed he said that the very time a constitutional provision is wanted, is in time of war, that in time of civil war especially, and in the commotions just before and just after it, the constitutional provisions are necessary to be most rigidly enforced. Suppose your Honors agree to that, and then suppose you agree with us, that in peace, when there is no commotion, the constitutional provisions should be most rigidly enforced ; have you done anything more than to say that constitutional provisions should always be most rigidly enforced? We say so. Constitutional provisions, within their application, should be most rigidly enforced. We do not ask anything outside of or beyond the Constitution. To show your Honors that we have high authority for this, I beg leave to read to you from the solemnly expressed opinion of John Quincy Adams, in 1836, in another speech :

"In the authority given to Congress by the Constitution of the United States to declare war, all the powers, incident to war, are by necessary implication conferred upon the government of the United States. Now, the powers incidental to war are derived, not from any internal, municipal source, but from the laws and usages of nations. There are then in the authority of Congress, and the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other—the war power and the peace power. The peace power is limited by regulation and restraints, by provisions prescribed within the Constitution itself. The war power is limited only by the law and usages of nations. The power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, property and life."

Of necessity it must do so. Therefore we say, that when the laws can take their full sway, the peace powers protect the citizen ; when they cannot, he must look to the bayonet for protection, and both to be finally regulated by the adjudication of the august tribunal before which I speak.

OPENING OF CIVIL COURTS DOES NOT DETERMINE THE JURISDICTION OF THE MILITARY AUTHORITY.

It is much insisted on by my friends on the other side, that the determining question as to the exercise of martial law, is whether the civil courts are in session; but I call your Honors' attention to the fact that the courts were in session in this city during the whole of the rebellion, and yet this city has been nearly the whole time under the martial law. Was there not martial law in this city, and did it not almost happen to have been the wrong kind of martial law, when, in 1864, about the time these American Knights were carrying on their operations in Indiana, Jubal Early was assaulting the city, and your Honors, if you had been sitting here, would have been disturbed by the sound of the enemy's cannon? Was not the city then under martial law? Yet the courts were in session. The reason why this is not a distinguishing test, is because it is the familiar and common exercise of martial law to allow the courts of a country, when it may be done with safety, to perform their ordinary functions in regard to crimes committed among the people towards each other, but rarely, if ever, is the jurisdiction permitted of crimes affecting the safety and well being of the army or the state. An instance of that permission is quite familiar to your Honors. In the proclamation of President Lincoln, of July 5th, 1864, when he extended martial law over Kentucky, he did not except the courts from its operation, but he put in a provision to except the elective franchise, when properly exercised, allowing martial law however to control rebel voters.

THE EXERCISE OF THE CIVIL AUTHORITY IN THE PRESENCE OF MARTIAL LAW IS ONLY PERMISSIVE.

Your Honors will observe that this exercise of civil power is wholly permissive and subordinated to the military power, and whether it is exercised or not, is wholly within the discretion of the commander. That is laid down by Wellington, and you will find it in every instance of the exercise of martial law. The commanders of armies, in the exercise of martial law, have always been glad, if by possibility they could do so, to have the courts carry on the ordinary operations of justice, and never have they interfered with them except in matters that pertain to their safety. We having asserted that the courts are allowed to act by permission of martial law, in districts where that law is in operation, the question has arisen whether, in districts which have been the seat of war, but where war has ceased its active operations, and before the settlement of the elements of society, before the return entirely to a peaceful state, and while armed forces are necessary to preserve the public peace, martial law prevails as the supreme law of such districts, until the force that occupies it is withdrawn. That, I say, has risen to be a question.

It is argued that because the inferior courts are in session, because legislators are returned to their legitimate duties, because the ordinary police machinery is in motion for the repression of ordinary crimes, because the rights between party and party are determined without the active interference of the military, in cases where their safety and rights are not involved, therefore, martial law must have lost its power; and that the determining test is in

the phrase of the old law-books, that "the King's Courts are open." But the King's Court, using that phrase for the highest court in the land, should not be open under the permission of martial law. In a constitutional government like ours, the Supreme Court should sit within its own jurisdiction, as one of the three great coördinate powers of the government, supreme, untrammeled, uncontrolled, unawed, unswayed, and its decrees should be executed by its own high *fiat*, as lightning executes the will of God. The Supreme Court has no superior, and therefore it is respectfully submitted that it is beneath the office of a judge of the Supreme Court of the United States, inconsistent with the dignity of the court whose robes he wears and whose ermine covers his shoulders, that he should sit in any district of country where martial law is the supreme law of the State, where armed guards protect public tranquility, the bayonet has the place of the constable's baton, where the press is muzzled by military permission, and where a general order construes a statute. On the contrary, we submit that all crimes and misdemeanors, of however high character, which have occurred during the progress and as a part of the war, however great the criminals, either civil or military, should be tried upon the scene of the offence and within the theatre of military operations; that justice should be meted out in such cases, by Military Commissions, through the strong arm of the military law which the offenders have invoked, and to which they have appealed to settle their rights. They should be dealt with by the law, thus called into being by their crimes, for millions of people during five years, and they should be adjudged of the crimes they have committed against the authority of the United

States, and the safety of the people, and should be brought to condign punishment under the fundamental enactment *salus populi suprema est lex.*

THE EFFECT OF THE HABEAS CORPUS ACT.

May it please your Honors, it is said that the second and third sections of the so-called *habeas corpus* act of March 3, 1863, apply to this case, because lists are ordered by those sections, to be prepared by the Secretary of War and Secretary of State, of all state and political prisoners, and if within twenty days of a grand jury assembling, they are not indicted, certain proceedings are to be had under that act, but the difficulty with this record is that it does not state the necessary facts to bring the case within that act. It does not allege that the petitioners are state or political prisoners otherwise than as prisoners of war; it does not allege that a list has been brought in, nor does it allege that a list has not been brought in. If a list had been brought in containing the name of one of these petitioners, it would have been the judge's bounden duty to call him up and inquire into his imprisonment; if no list had been brought in, his case could only be brought before the court by some petition, and the judge, upon being satisfied that the allegations of the petition were true, would discharge him. But there is no certificate in the division of opinion that the judges were or were not satisfied that the allegations of these petitioners were true; nor were the petitions brought under the provisions of that duty; nor is it alleged that they have taken the oath of allegiance, which is a condition precedent to a discharge under that act.

Thus, may it please your Honors, I have passed over cursorily, and to the great weariness, no doubt, of the court's patience, the several propositions of law in this case. Most of them will be spoken to by my brothers on the same side, with more effect and to more purpose. If I have succeeded in bringing any point or proposition in this case, either by argument or by illustration, to the mind of the court, so as to aid them in their investigations, which are of so much consequence, I shall have done all that I could hope to do. I do not wish, so far as in me lies, that the able, and my respect for the forum prevents my saying specious, argument addressed to your Honors, shall put the case in a false light; that any decision, which your Honors may make here shall exalt the martial above the civil law. Nor do I believe that in the remarks I have made, I shall be understood by the Court as desiring to exalt the martial above the civil law, or to substitute the necessarily despotic and arbitrary rule of the one, for the mild and healthy restraints of the other. My lot in life was cast in a part of the country where all the affairs of men are carried on in strict subservience to the law. Reared in its study; ministering humbly at its altar during my entire manhood; drinking, alas! not deeply, at the fountains of its pure principles; taught to reverence its ministers, sitting in its high seats of justice, as in a position higher than that of the command of armies or any exhibition of executive power, I should be false to every thought and teaching of my life, if I should advocate that one jot, or one tittle, of the great fabric of the common law, the perfection of human reason, guarded by constitutional enactments, and extended by legislative pro-

visions, only to be enforced after judicial examination, the rights of all prosecuted and defended by those learned in its principles and its decrees, at once so remedial and so just, that one of its great masters has likened it to the rule of the nursing mother, should be overthrown or subverted. Far, far, otherwise.

THE LAW MARTIAL NECESSARY TO PRESERVE IT.

On the contrary, I am only demanding that when the law is silent, when justice is overthrown, when the life of the nation is threatened by foreign foes, that league and wait and watch without, to unite with domestic foes within, who had seized almost half the territory, and more than half the resources of the government, at the beginning, when the Capital is imperilled, when the cowardly traitor within plots to bring into its peaceful communities the braver rebel who fights without, when the judge is deposed, when the juries are dispersed, when the sheriff, the executive officer of law, is powerless, when the bayonet is called in as the final arbiter, when on its armed forces the government must rely for all it has of power, authority, and dignity, when the citizen has to look to the same source for every thing he has of right in the present, or hope in the future,—then we ask that martial law may prevail, so that the civil law may again live to the end, that this may be a "government of laws and not of men."